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Supreme Court, U.S.
FILED

101117 MAR 10 2011

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No.

In the
Supreme Court of the United States

RUTH NAGLICH and LAURA FERRELL,

Petitioners,

v.

LARRY CAMP and SABRINA MARTINDALE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the intersection of principles established by this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), regarding the application of the First Amendment, with principles established by this Court in *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), regarding qualified immunity. Specifically, this case raises questions whether the § 1983 immunity doctrine protects a State official from claims of a First Amendment violation:

1) Where evidence shows that she urged a State agency's private contractor not hire a prospect in retaliation for speech related to, and arguably pursuant to, the official duties of previous State employment, or

2) Where, if her retaliatory grounds for not hiring are deemed to be against speech undertaken as a citizen, she did not cause the action because there is evidence that the private contractor acted on non-speech grounds?

PARTIES TO THE PROCEEDING

Petitioners are Ruth Naglich and Laura Ferrell, defendants in the district court. They were appellants before the U.S. Court of Appeals for the Eleventh Circuit in No. 09-15770.

Respondents are Larry Camp and Sabrina Martindale, the original plaintiffs in the district court. They were appellees in the appeals court in No. 09-15770.

There were two other defendant parties to the proceedings in the district court: Richard Allen and Correctional Medical Services, Inc. Both were dismissed by the order which is sought to be reviewed.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Naglich and Ferrell (collectively "Petitioners") respectfully petition this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals is unpublished, but is available at *Camp v. Correctional Medical Services, Inc.*, 2010 WL 4058138 (11th Cir. Oct. 18, 2010), and is reprinted in the Appendix, *infra*, at App. 1a-9a. The decision of the district court is reported at *Camp v. Correctional Medical Services, Inc.*, 668 F. Supp. 2d 1338 (M.D. Ala. 2009), and is reprinted in the Appendix at App. 10a-71a.

STATEMENT OF JURISDICTION

The court of appeals issued its decision on October 18, 2010. App. 1a. On December 14, 2010, the court of appeals denied the Petitioners' timely request for rehearing and rehearing *en banc*. App. 74a-75a. The issuance of the mandate of the court of appeals is stayed by order issued on December 28, 2010. App. 72a-73a.

Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, sec. 1

. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV, sec. 5

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, ...

STATEMENT OF THE CASE

This Petition seeks review to protect the managerial discretion of State personnel who act to control speech about details of the workplace. After *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the contours of that discretion have been the subject of conflicting analyses by the courts of appeal. Those analyses focus on the difference between speech undertaken by a State employee as a citizen, which is protected by the First Amendment, and speech made pursuant to job duties, which is not protected. As a result of the conflicting analyses, the law is not clearly established under this Court's decision in *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), and the Petitioners are entitled to qualified immunity.

The Eleventh Circuit decision here, however, denied immunity to the Petitioners and faulted them under the First Amendment without the fair warning of clearly established law required by this Court's precedents. The Eleventh Circuit decision also denied immunity to the Petitioners, who urged against hiring a job prospect allegedly on the basis of protected speech, where final decision-making power was exercised by others with non-speech related grounds.

I. Statement of the Facts

In 2007, the Petitioners held administrative positions within the Alabama Department of Corrections and were responsible for the oversight of

medical care to inmates. App. 17a, 78a, 91a. The Petitioners had previously worked for private contractors that fulfilled medical care duties in the Alabama prison system. Ferrell had been an executive for Prison Health Services, Inc. ("PHS"). App. 14a, 94a. Naglich had been a third-party contract monitor of services provided by PHS. App. 157a-159a. Both Respondents had been PHS employees providing dental care to Department inmates and were discharged in 2004. App. 12a, 14a-15a.

In late 2007, PHS was being replaced as the Department's contractor by Correctional Medical Services, Inc. ("CMS"). App. 15a. Shortly after CMS began seeking personnel for the Department work, Respondent Camp applied to be a prison dentist. In the course of Camp's application process, a CMS hiring manager received an unsolicited email from a former Department colleague of Camp from PHS days. The e-mail was not flattering; it said: "This is the guy who wrote everyone from the commissioner down to stir up trouble for PHS. I guarantee you he will not work an 8-hour day consistently. The Board believed his crap against me. No one else did!" App. 15a-16a. The "Board" is the Alabama State Board of Dental Examiners, which is charged by statute with overseeing the licensing and practice of dentists in Alabama under Ala. Code § 34-9-2 *et seq.*

The CMS hiring manager then, by email, sought advice from Naglich and Ferrell about Camp. App. 16a-17a. One provision of the Department's contract with CMS gave the Department authority to stop

CMS from hiring a person for work on the Department's contract, though that authority was not to be exercised "unreasonably." App. 15a.

Ferrell responded to the CMS hiring manager first and objected strongly, but without explanation. A few minutes later, Ferrell wrote again, stating: "This is the one who had us all before the State Dental Board . . ." when PHS was the contractor. App. 17a.

While serving as contractor in 2003, PHS had established "a general policy requiring that dentists report misconduct to PHS and the Dental Board," App. 42a. In late 2003, while employed at the Department by PHS, Camp had complained to PHS and to the Department's head about a supervising prison dentist. App. 13a-14a; 163a-167a. He threatened to leave absent personnel changes and correction of supply shortages. *Id.* A few days later, Camp had complained to the Dental Board and referred to knowledge his assistant, Respondent Martindale, could share about the supervisor. App. 168a-169a. For her part, Martindale also submitted a complaint to the Dental Board about the supervisor in early 2004. App. 13a-14a; 171a-174a.

Camp acknowledged a "professional obligation" to report a fellow dentist to the Board in the event of misconduct. App. 146a-147a. Martindale, too, though not a licensed dentist, felt an obligation to report the same supervising dentist to the Board and sought assistance from PHS in order to do so. App. 149a-152a.

Camp lost his PHS job in January 2004 for "failure to follow policies and procedures and not following the chain of command." App.14a-15a. Eight months later, Ferrell noticed Martindale leaving work early and, in December 2004, Martindale lost her PHS job as a result of the incident. App. 15a. Ultimately, in late 2005, the Dental Board sanctioned the supervisor with a fine for failure to use proper infection control procedures on several tooth extractions performed on November 19, 2003. App. 14a.; also App. 174a-181a.

Ferrell did not possess final authority to make decisions for the Department about hiring; Naglich did have that authority. App. 162a. Several days after CMS sought advice about hiring Camp in 2007, Naglich offered her opinion that it was "'[n]ot in our best interest' to hire Camp." App. 17a. In a follow-up conversation with the CMS hiring manager, Naglich explained that Camp had "time and attendance issues while employed at PHS." App. 17a-18a. In Naglich's previous work as outside monitor of the Department's PHS contract, while verifying payroll hours claimed, a PHS executive had advised her that Camp had been released due to failure to work the required hours. App. 156a-159a. At the same time that Naglich advised the CMS hiring manager about Camp, she told him that Martindale had also been let go from PHS due to time and attendance issues. App. 20a.

CMS ultimately decided not to hire Camp or Martindale. App. 12a. There was no CMS policy against hiring persons who undertook speech

protected by the First Amendment. Rather, CMS accepted Naglich's facially neutral objection to hiring Camp. App. 29a-30a.

II. District Court Proceedings

Camp and Martindale filed suit in early 2008 against Petitioners as well as CMS and the head of the Department, Richard Allen. App. 20a. They asserted that the decision not to hire them in 2007 violated state law and the First Amendment and Fourteenth Amendment of the U.S. Constitution. The defendants were alleged to have conspired together to deny Camp and Martindale positions. Camp and Martindale sought damages and equitable relief as allowed by 42 U.S.C. § 1983, and attorneys fees under 42 U.S.C. § 1988. App. 2a, 20a, 110a-144a. Jurisdiction was based on 28 U.S.C. § 1331 and § 1367. App. 11a. Petitioners filed an Answer which asserted immunity as a defense. App. 90a, 102a.

The district court granted Petitioners' subsequent motion for summary judgment on the Respondents' state law claims. App. 71a. The district court denied summary judgment on Camp's First Amendment-based claims. The court found substantial evidence that the Petitioners were acting within the scope of their discretionary authority, that their actions were motivated by speech on a matter of public concern, and that Camp's speech was undertaken "as a citizen." App. 32a-34a, 34a-42a (discussing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). The district court drew guidance from, and distinguished, the Eleventh

Circuit's unreported decision in *Akins v. Fulton County*, 278 F. App'x 964 (11th Cir. 2008) ("*Akins II*"), where employees had gone outside the chain of command to report purchasing irregularities, yet were found not to be speaking "as citizens." App. 41a. The district court here said that Camp's complaints were based on prisoner care rather than employer bidding policy integrity, so the speech did not "owe its existence to" his professional obligations. App. 42a (quoting *Garcetti*, 547 U.S. at 421-22). Thus, the speech remained eligible for protected status because it was made "as [a] citizen[]." App. 42a.

The district court then balanced the interests of the Department against Camp's interests and found his speech to be protected under *Pickering v. Board of Education*, 391 U.S. 563 (1968). The court identified Ferrell's email and Naglich's "not in our best interest" remark as evidence that Petitioners' retaliatory motives caused Camp not to be hired by CMS for its Department contract. App. 43a-48a. The court concluded that immunity was not available because "the law prohibiting state officials from retaliating against employees who engage in protected speech is 'clearly established.'" App.51a.

The district court denied summary judgment to Naglich on Martindale's First Amendment claim on the same analysis, but granted summary judgment on all other claims by Martindale. App. 71a. Particularly, the court concluded that Ferrell was not involved in the CMS decision not to hire Martindale. App. 45a-46a.

The district court granted summary judgment for CMS. It reasoned that there was no evidence of any CMS policy against hiring persons who had engaged in protected speech and that the CMS hiring manager did not have "authority to determine policy with respect to these hiring decisions." App. 30a (emphasis removed). The court deemed the CMS contract provisions allowing the Department hiring authority not to establish an improper policy. The contract only gave the Department "ultimate authority to reject candidates for employment" so long as that authority "not be unreasonably exercised." App. 15a, 27a, 29a. Under the principles of *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), these facts established that an improper policy had not "caused" Respondents not to be hired. As a result, CMS was deemed not liable under § 1983. App. 29a-30a.

The district court granted summary judgment for the Department head, Richard Allen. The court concluded that he was not involved in the CMS decisions not to hire Camp and Martindale. Though Allen was contacted by Camp about CMS's decision, that contact did not occur until after the decision was made. Therefore, Allen was deemed not to have caused any retaliatory action. App. 50-51a.

Petitioners filed a notice of appeal, and the district court stayed its proceedings.

III. Eleventh Circuit Proceedings

The Eleventh Circuit affirmed in an unpublished, *per curiam* opinion. It accepted the facts set out by the district court, including, apparently, that Respondents' employer, PHS, had "a general policy requiring that dentists report misconduct to PHS and the Dental Board." App. 2a-3a, 42a. It also accepted that Alabama statutes can help determine the scope of employee duties. App. 8a n.2 (citing *Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008). However, the appeals court stated that Camp's particular "job responsibilities as an employee for PHS did not make reporting to the Dental Board part of his official responsibilities." App. 8 n.2 (citing *Garcetti v. Ceballos*, *supra*). Thus, the court rejected the Petitioners' argument that, because "Camp was required to report to the Dental Board as part of his professional responsibilities as a licensed dentist . . ., complaining to the Board was simply part of Camp's official job duties, and his speech was not protected." App. 8a n.2. Instead, the appeals court concluded that Camp's job was to provide dental care to inmates, not oversee other dentists at Department facilities. App. 8a n.2.

About Martindale, the appeals court said simply that she was a dental assistant, and would not be subject to duties imposed on a dentist. App. 8a n.2.

The appeals court modified the immunity analysis of the district court, which it said "conflates the *Pickering* merits issue with the clearly established law issue that governs the qualified immunity defense." App. 5a-6a. However, the appeals court

judged the balance of interests required by the *Pickering* case to weigh heavily in favor of the Respondents. Therefore, the court concluded that this case was not one "in which retaliation for speech violates the First Amendment rights of the plaintiff but qualified immunity protects the defendants from a monetary judgment against them." App. 6a, 8a-9a.

The appeals court pointed to *Akins v. Fulton County*, 420 F.3d 1293 (11th Cir. 2005) ("*Akins I*"), as a case with analogous facts where procurement irregularities were reported by whistle-blowers. App. 6a-7a. The appeals court wrote: "We held in *Akins* not only that a reasonable factfinder could conclude that the director had violated the two contracting officers' First Amendment rights . . . , but also that the result of the *Pickering* balancing was clear and predictable enough to defeat a motion for summary judgment based on qualified immunity . . . . The same is true here." App. 6a-7a. In the court's opinion: "A factfinder could reasonably find from the evidence that Camp and Martindale were acting as whistleblowers by reporting unsanitary, dangerous and brutal practices to the Dental Board." App. 7a-8a.

In *Pearson*, the Court considered the law at the time of the actions of the defendants before it and determined that they were entitled to qualified immunity because uncertainty in the law rendered the unlawfulness of their conduct not clearly established. *Id.* at 822-23. Specifically, this Court noted that "where the divergence of views on the [determinative legal] doctrine was created by the decision of the Court of Appeals . . ., it is improper to subject petitioners to money damages for their conduct." *Id.* at 823 (citing *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (refusing to fault defendants for choosing the losing side of a legal controversy)).

Similarly, in *Safford Unified School Dist. No. 1 v. Redding*, 129 S.Ct. 2633, 2644 (2009), this Court considered qualified immunity where the circuits had "reached divergent conclusions" regarding how to apply the Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), to strip searches in public schools. 129 S. Ct. at 2643. The Court found the search at issue in the case to be a violation of the student's Fourth Amendment rights. Nonetheless, it found that the "substantial" differences of opinion among the judiciary after *T.L.O.* "requir[ed] immunity for the school officials in the case," because the numerous, well-reasoned, divergent opinions cast doubt whether the Court was "sufficiently clear in the prior statement of law." 129 S. Ct. at 2644. Accordingly, this Court found qualified immunity warranted because the law was not clearly established.

The Eleventh Circuit decision in this case conflicts with *Pearson* and *Safford* and with the decisions of other circuits regarding whether immunity is available for claims that public employer personnel engaged in retaliation in violation of the First Amendment. Specifically, significant differences of opinion among the circuits on points of law central to this case warrant certiorari review and preclude, as a departure from established principles of qualified immunity, any finding that the Petitioners "violate[d] clearly established . . . rights of which a reasonable person would have known." *Pearson*, 129 S. Ct. at 815.

I. Differences of Opinion Among Circuit Judges About the Application of the *Garcetti* Decision Warrant Certiorari Review.

There are significant differences of opinion as to the application of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and the First Amendment, to public employees engaged in speech related to the duties of their employment. These differences justify a finding that the law regarding employee speech that owes its existence to government employment is not clearly established and that public employer personnel should receive immunity from § 1983 damage claims arising from such speech.

In *Garcetti*, this Court rejected claims that a public employee who complained to his supervisor about the work performance of a colleague was protected by the First Amendment. The Court held

that First Amendment protection for public employees required that the employee be speaking "as a citizen addressing matters of public concern," rather than as an agent for the public employer. It was held not enough to avoid First Amendment protections that the speech merely "concerned the subject matter" of the employment or occurred within the workplace. 547 U.S. at 421. However, employee speech made "pursuant to . . . official duties," was held to be not made "as a citizen." Such speech "owes its existence to" what the government has created, and restricting it "reflects the exercise of employer control over what the employer itself has commissioned." *Id.* at 421-22. Such speech is not insulated from employer discipline because the government "acts in its role as employer." *Id.* at 418.

Certain elements of the *Garcetti* analysis were concerned about the "displacement of managerial discretion by judicial supervision" in the name of constitutional rights. *Id.* at 423 (cited in *Engquist v. Oregon Dept. of Agriculture*, 533 U.S. 591 (2008) (rejecting Fourteenth Amendment claim for arbitrary denial of employment)). *See also, id.* at 420 ("Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)); *Rust v. Sullivan*, 500 U.S. 173 (1991) (First Amendment not violated by government restriction of what doctors say in family planning programs it funds). *Cf.*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125,

1138-39 (2009) (Stevens, J., concurring) (finding private cross displayed on public land to be speech of the government, describing *Garcetti* as part of government speech doctrine).

After *Garcetti*, therefore, when a public employee's speech does concern the subject matter of, and owes its existence to, his official duties, it is not clearly established that he speaks "as a citizen." Rather, the speech may be made as a public employee, and may be a proper subject of action by his public employer. Thus, claims under § 1983 against public employer personnel who recommend action for such speech should not provide damages when the employee speaks about the subject matter of, and the speech owes its existence to, his official duties. *See, e.g., Safford*, 129 S. Ct. at 2644; *Pearson*, 129 S. Ct. at 822-23.

A. Conflict Among the Circuits Regarding the Requisite Specificity of Job Duties under *Garcetti* Warrants Certiorari Review.

Certiorari should be granted to resolve circuit conflicts about the liability of government personnel who, after *Garcetti*, have misjudged the scope of their authority to manage the speech of public employees. These conflicts turn on how specific to the particular public employee the official duty to speak must be to qualify as "pursuant to" the employee's "official duties."

In this case, the Eleventh Circuit held that the complaint to the Dental Board was not part of

Camp's specific job responsibilities, which "were to provide dental care to inmates," and did not include "overseeing the practices of other dentists at prison facilities." App. 8a n.2. As the district court found, Camp's complaints were made "pursuant to a general policy requiring dentists to report misconduct to PHS and the Dental Board," but not as part of Camp's "daily professional activity." App. 42a. The appeals court acknowledged that "Alabama statutes may impose on Camp a general responsibility to report knowledge of other dentists' misconduct." App. 8a n.2 (citing *Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008). That kind of policy and responsibility, however, were deemed too general to be "pursuant to [Camp's] official duties."

The Eleventh Circuit concluded that Martindale did not have the same reporting duty to the Dental Board as Camp. App. 8a n.2. However, the appeals court did not mention that her complaint was related to her work duties-- in a prison, that she reported her observations of a prison dentist's misconduct to PHS personnel, or that she enlisted PHS assistance in preparing the complaint she ultimately filed with the Dental Board. App. 150a-152a. Nonetheless, the appeals court considered Martindale's speech protected under the First Amendment.

The Eleventh Circuit's assertion that the Respondents' speech is protected because it was not part of their "daily professional activity" conflicts with the holdings of other circuits. The Seventh Circuit's decision in *Trigillo v. Snyder*, *supra*, considered the actions of a State purchasing officer

who reported concerns about potential bid rigging to a third-party agency outside the employee's chain of command. The *Trigillo* court, however, rejected "day-to-day duties" as the touchstone for speech not protected by the First Amendment. 547 F.3d at 829. Instead, it held that, because the employee's speech was made as "a means to fulfill [the employee's] obligation" to her job duties, the speech was not protected by the First Amendment. *Id.* at 830.[1]

Similarly, in *Weintraub v. Board of Education*, 593 F.3d 196, 203 (2d Cir. 2010), First Amendment protection was held not available to a public school teacher. The teacher had complained to his public employee union against his supervisor for not

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[1] *See also Ogden v. Atterholt*, 606 F.3d 355 (7th Cir. 2010) (speech held pursuant to employee's job duties where overall purpose was to aid management of employee's division); *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (rejecting focus on "core" job function and finding speech pursuant to job duties where it aided the employee's responsibilities); *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008) (finding nurse's memorandum to hospital officials, although not part of core job function, pursuant to job duties because it discussed patient care, advocated on behalf of patients, and concerned the nurse's particular job duties); *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007) (rejecting consideration of "core" job functions as too narrow and finding speech pursuant to job duties because it was consistent with the prison employee's general duty to keep prison secure).

disciplining a student who disrupted the classroom. There was no directive or regulatory requirement to file a grievance. However, the Second Circuit found the speech to be "pursuant to official duties" because it was in furtherance of the employee's duties as a teacher in preserving his classroom function.

Also, in *Winder v. Erste*, 566 F.3d 209, 215-16 (D.C. Cir. 2009), a public employee, whose job duties included ensuring school compliance with a district court ruling, complained repeatedly outside his chain of command regarding his supervisors. The D.C. Circuit held that the speech was made pursuant to the employee's official job duties because it reported conduct that interfered with his job responsibilities and was made in an attempt to implement the district court ruling with which he was required to ensure compliance. *See also Chavez-Rodriguez v. City of Sante Fe*, 596 F.3d 708, 714, 716 (10th Cir. 2010) (city administrator's speech at banquet and comment to a legislator about her agency's budget held not part of her day-to-day job responsibilities, but nonetheless protected).

The Respondents' complaints about their colleague's work, though not part of their "daily duties," were a means to aid and fulfill their job duties to provide dental care to inmates. Camp, for example, sought personnel changes and the resolution of supply shortages relative to his work. Therefore, had principles such as those applied in *Trigillo*, *Weintraub*, and *Winder* been followed here, the Respondents' complaints would have been found

pursuant to their official duties and not protected by the First Amendment.

Additionally, the Eleventh Circuit's assertion that the PHS policies and Alabama statutory duties were too general to be "pursuant to official duties," conflicts with the holdings of other circuits. In another Seventh Circuit case, *Fairley v. Andrews*, 578 F.3d 518, 520, 522-23 (7th Cir. 2009), First Amendment protection was held not available to plaintiffs who complained about the misconduct of their peers as required by "Jail General Orders" issued from a supervisor. Despite their general nature, the orders were deemed to be sufficiently directed to the plaintiffs that the complaints were made "pursuant to their official duties." *See also Houskins v. Sheahan*, 549 F.3d 480 (7th Cir. 2008) (internal complaint pursuant to official job duties because it was required under department's "General Orders" and standards of conduct).

Similarly, in *Barclay v. Michalsky*, 368 F. App'x 266, 268 (2d Cir. 2010), the Second Circuit found that a general workplace requirement to file complaints about nurse co-workers mistreating patients imposed an official duty. As the Respondents have in this case, the employee in *Barclay* testified that the duty to file complaints was "*my* job" and "*my* duty." Thus, the Second Circuit held that the speech was not protected.[2]

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[2] *See also Bonn v. City of Omaha*, 623 F.3d 587 (8th Cir. 2010) (finding that employee's admission that

In this case Camp spoke pursuant to PHS duties pursuant to his professional obligations as a dentist. Further, both Respondents admitted that they spoke pursuant to their professional duties. App. 146a-147a, 149a-152a. Again, had such principles as those applied in *Fairley* and *Barclay* been followed in this case, the Respondents' complaints would have been found pursuant to their official duties and not protected by the First Amendment.

Furthermore, the Eleventh Circuit's assertion that Camp lacked oversight duties would fail to render his speech protected in other circuits. In *Vose v. Kliment*, 506 F.3d 565 (7th Cir. 2007), a narcotics officer reported misconduct by members of another unit. The Seventh Circuit held that the officer's speech was not that of a private citizen simply because he did not have an explicit responsibility for the conduct of the alleged wrongdoers. *Id.* at 570. The court further rejected any reliance on the officer's "daily" or "core" job responsibilities. Instead, the court found the speech pursuant to the officer's official duties because the alleged misconduct he spoke about affected his ongoing investigations. Once again, if these principles applied in *Vose* had been applied in this case, the Respondents' speech would

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report was prepared pursuant to official duties defeated § 1983 First Amendment claim); *Callahan v. Fermon*, 526 F.3d 1040 (7th Cir. 2008) (speech held pursuant to police officer's official duties where officer conceded that police rules of conduct required report of misconduct of fellow employees).

have been held pursuant to their job duties because they, too, reported misconduct that affected their ongoing work.[3]

In conflict with these cases from the Second, Seventh, and D. C. Circuits, the Ninth Circuit has held that an employer must specifically require speech if it is to be a proper subject of employer control. In *Alaska v. EEOC*, 564 F.3d 1062, 1070 (9th Cir. 2009) (*en banc*), the circuit held that speech is protected if "official duties didn't require [the employee] to complain" about the mistreatment of a co-worker by a supervisor. *See also*, *Anthoine v. North Central Counties Consortium*, 605 F.3d 740 (9th Cir. 2010);[4] *Thomas v. City of Blanchard*, 548 F.3d 1317, 1324, 1326 (10th Cir. 2008) (declining to find a "job duty" under a statute imposing criminal liability on the ground that the statute was "aimed at

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[3]Additionally, if the decision below is understood as a case about testimony at adjudicative proceedings before a regulatory board or court, the outcome remains in conflict with another Seventh Circuit decision, *Matrisciano v. Randle*, 569 F.3d 723, 735-36 (7th Cir. 2009).

[4]However, the Ninth Circuit has found speech not protected when it arises from a duty imposed generally by a statute on a class of persons. *See Huppert v. City of Pittsburg*, 574 F.3d 696, 707 (9th Cir. 2009) (finding testimony to grand jury pursuant to official duties under general police officer duty to provide testimony to grand jury).

every public official" and noting that a housing inspector "was not hired to detect fraud in connection with the issuance of certificates of occupancy; he was hired to inspect houses.").

The above-cited cases demonstrate conflict and confusion among the circuits after *Garcetti* regarding how specific a duty must be to render speech "pursuant to official duties" and thus not entitled to First Amendment protection. Under conflicting precedent from other circuits, the Respondents' speech would be held pursuant to their official duties. Accordingly, under the qualified immunity principles established by *Safford* and *Pearson*, *supra*, the law is not clearly established and certiorari is warranted to review the Eleventh Circuit's decision.

B. Conflict Among the Circuits Regarding the Different Standards for Resolving Whether an Employee Speaks "as a Citizen" Warrants Certiorari Review.

In *Safford*, supra, this Court noted cases interpreting *T.L.O.*, the Supreme Court decision at issue there, as "'a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other' . . . which made it impossible 'to establish clearly the contours of a Fourth Amendment right . . . [in] the wide variety of possible school settings different from those involved in *T.L.O.*' itself." 129 S. Ct. at 2643 (quoting *Jenkins v. Talladega City Bd. of Ed.*, 115 F.3d 821, 828 (11th Cir. 1997)). Similarly, after *Garcetti*, it is

impossible to clearly establish the contours of a government employee's First Amendment rights in settings different from *Garcetti* itself. Contributing to this problem, the *Garcetti* decision has spawned numerous standards among the circuits for evaluating whether an employee speaks "as a citizen," and is thus entitled to First Amendment protection.

Drawing on language from the *Garcetti* opinion, the circuit courts articulate the determinative inquiry to determine whether an employee speaks "as a citizen" at least nine different ways: 1) whether the speech has a relevant analogue to speech made by citizens;[5] 2) whether the speech was made as a means to fulfill the employee's job duties;[6] 3) whether the speech was made in the course of performing the employee's job duties;[7] 4) whether the speech was

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[5] *See Foley v. Town of Randolph*, 598 F. 3d 1, 7-8 (1st Cir. 2010).

[6] *See Weintraub v. Bd. of Educ. of City Sch. Dist. of New York*, 593 F.3d 196 (2d Cir. 2010), *Trigillo v. Snyder*, 547 F.3d 826, 829-30 (7th Cir. 2008), *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1203 (10th Cir. 2007), *Winder v. Erste*, 566 F.3d 209, 215-16 (D.C. Cir. 2009).

[7] *See Weintraub v. Bd. of Educ. of City Sch. Dist. of New York*, 593 F.3d 196 (2d Cir. 2010), *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007), *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, (6th

among the tasks the employee was paid to perform;[8] 5) whether the speech was expected by the employer;[9] 6) whether the speech owed its existence to the employee's official job duties;[10] 7) whether the speech was part of the employee's official responsibilities;[11]

Cir. 2007), *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1203 (10th Cir. 2007).

[8]*See Foraker v. Chaffinch*, 501 F.3d 231, 241-42 (3d Cir. 2007), *Miller v. City of Canton*, 319 Fed. Appx 411, 417 (6th Cir. 2009), *Rohrbough v. University of Colorado Hosp. Authority*, 596 F.3d 741, 746 (10th Cir. 2010).

[9]*See Foraker v. Chaffinch*, 501 F.3d 231, 241-42 (3d Cir. 2007), *Fairley v. Andrews*, 578 F.3d 518, 523 (7th Cir. 2009), *Trigillo v. Snyder*, 547 F.3d 826, 829-30 (7th Cir. 2008), *Lindsey v. City of Orrick, Mo.*, 491 F.3d 892, 898 (8th Cir. 2007), *McGee v. Public Water Supply, Dist. No. 2 of Jefferson County, Mo.*, 471 F.3d 918, 921 (8th Cir. 2006).

[10]*See Fox v. Traverse City Area Public Schs. Bd. of Educ.*, 605 F.3d 345, 348 (6th Cir. 2010), *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, (6th Cir. 2007), *McGee v. Public Water Supply, Dist. No. 2 of Jefferson County, Mo.*, 471 F.3d 918, 921 (8th Cir. 2006), *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283-84 (11th Cir. 2009).

[11]*See Spiegla v. Hull*, 481 F.3d 961, 966 (7th Cir. 2007), *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir.

arbitrary application of § 1983 that this Court should correct.

In light of the varied and conflicting statements of the determinative inquiry after *Garcetti*, it is impossible to clearly establish the contours of a government employee's First Amendment rights. The Petitioners, therefore, could not have reasonably been expected to anticipate whether the Eleventh Circuit would consider the Respondents' speech "as citizens" or "as employees." As a result, the law is not clearly established under the qualified immunity principles of *Safford* and *Pearson*, and the widely divergent and conflicting statements of the relevant standards for "citizen speech" after *Garcetti* warrant certiorari review of the Eleventh Circuit's decision.

C. Conflict Among the Circuits Regarding Whether Law Protecting Employee Speech Is Clearly Established after *Garcetti* Warrants Certiorari Review.

Significant differences of opinion exist among the circuits, not only regarding the substantive application of *Garcetti*, but also regarding *Garcetti*'s effect on § 1983 immunity.

The Eleventh Circuit made no explicit mention of whether the *Garcetti* decision had any bearing on Petitioners' § 1983 immunity. Instead, it noted that the district court had conflated the merits of the First Amendment inquiry with the clearly established law issue. Thus, the appeals court held that the balance of interests between the public employer and the

employee so obviously weighed in the employee's favor that § 1983 immunity was lost. App. 8a-9a. According to the decision here, the State interest in limiting "whistleblowers" who are "reporting unsanitary, dangerous, and brutal dentistry practices to the Dental Board" was so small that individual liability could be proper against persons who cause adverse job action against the whistle-blower. *Id.* at 7a-9a.

After *Garcetti*, however, the Seventh and Eighth Circuits have granted qualified immunity on claims otherwise cognizable under the First Amendment for public employees against public employer personnel, finding that the rights were not clearly established. *See Chaklos v. Stevens*, 560 F.3d 705, 712 (7th Cir. 2009) (general statutory duty to report bid irregularity, First Amendment protection of employees' letter protesting employer's outside contract with employees' competitor "not obvious"); *Dempsey v. City of Omaha*, 2011 WL 383723 (8th Cir. 2011) (refusal to re-hire police chief following public comments on annexation, questions occupied "the core of the dispute" and the "contours of speech control" were not established with sufficient precision).

Similarly, the Second Circuit has also granted immunity, finding that whether employees spoke "as citizens" was not clearly established where they spoke about their workplace, but not pursuant to official duties. *See Drolett v. DeMarco*, 382 Fed. Appx. 7 (2d Cir. 2010) (complaints outside chain of command not pursuant to official duty).

Reaching the opposite conclusion, the Third, Fifth, Ninth, and Tenth Circuits have all denied qualified immunity after *Garcetti*, without regard to uncertainty over whether speech clearly was undertaken "as a citizen." *See Reilly v. City of Atlantic City*, 532 F.3d 216, 232 (3d Cir. 2008) (courtroom testimony clearly established to be "as a citizen," even if pursuant to general duties as policeman); *Charles v. Grief*, 522 F.3d 508, 511, 515 (5th Cir. 2008) (employee of lottery commission speech to legislator held not pursuant to job duty, immunity denied without discussing *Garcetti* effect on whether status "as a citizen" was "clearly established"); *Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008) (stating nothing on *Garcetti's* effect on qualified immunity); *Clairmont v. Sound Mental Health*, 2011 WL 149371 (9th Cir. 2011) (same with respect to retaliation for testimony at criminal proceeding); *Eng v. Cooley*, 552 F.3d 1062, 1075-76 (9th Cir. 2009) (labels argument to be "beside the point," treats "pursuant to official duties" inquiry as factual); *Casey v. West Las Vegas Independent School Dist.*, 473 F.3d 1323 (10th Cir. 2007) (finding First Amendment protection of speech regarding open meetings act clearly established without addressing *Garcetti*).

As noted above, this Court's opinions in *Safford* and *Pearson* each found the law not clearly established for purposes of qualified immunity where there were significant variances in decisions by the judiciary resulting from questioned or developing nuances in the law. Decisions such as that of the

Eleventh Circuit in this case, and of the Third, Fifth, Ninth, and Tenth Circuits noted above, adopt an approach that is not faithful to the qualified-immunity analysis required by *Safford* and *Pearson*. In those cases, the courts, upon concluding that the first part of the qualified immunity analysis is satisfied-- i.e., finding that the facts show a violation of a constitutional right-- find the second part of the analysis-- regarding whether the right at issue was clearly established at the time of the defendant's conduct-- satisfied without making full inquiry into that second part of the analysis. In other words, upon deciding that a violation of a constitutional right occurred, these cases simply conclude that the right was clearly established without substantive analysis. This Court's decisions in *Safford* and *Pearson* require more consideration of analogous facts in other circuits which find for the defendants.

In this case, the Eleventh Circuit said that it was clarifying that the merits of the First Amendment issue are not to be conflated with whether the law was clearly established. App. 5a-6a. Nonetheless, the court truncated the inquiry into whether the law was clearly established. The Eleventh Circuit did not consider analogous cases from other circuits, or within the Eleventh Circuit, which found for the defendants.

Oddly, the Eleventh Circuit instead pointed to *Akins v. Fulton County*, 420 F.3d 1293 (11th Cir. 2005) ("*Akins I*"), *supra*, as showing analogous facts to support a finding that the law is clearly established and whistle-blowers are entitled to relief.

However, after the *Garcetti* decision issued, while the case was on remand after reversal in *Akins I*, the district court found for the defendants; it "concluded that, under *Garcetti*, the[] discussions [at issue] were not protected speech under the First Amendment." *Akins II*, 278 Fed. Appx. at 967. On appeal a second time, the Eleventh Circuit affirmed, expressly concluding that the employees did not speak as private citizens under *Garcetti*, but as public employees. *Akins II*, 278 Fed. App'x. at 971. By its own precedent, therefore, the law on analogous facts was not so clearly established after *Garcetti* regarding whether speech was entitled to First Amendment protection as the Eleventh Circuit in this case held.

The Eleventh Circuit in this case also noted that "only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated clearly established rights," App. 5a. (quoting *Stanley v. City of Dalton*, 219 F.3d 1280 (11th Cir. 2000), but it swiftly concluded that immunity was not available to the Petitioners. The controversy over the Respondents' complaints about their former prison dentist colleague, however, is not that rarest of cases contemplated in *Stanley*. In light of the differing standards articulated by the circuits after the *Garcetti* decision, it is not possible to draw the lines clearly enough to affix personal damages liability on a government official for acting against speech related or owing its existence to the employment of the speaker. Thus, this case bears no resemblance to,

e.g., the unnecessary and wanton infliction of pain that a reasonable person would not undertake. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002) (Alabama prison officers leaving inmates tied to post for long periods).

By denying immunity to the Petitioners, the appeals court decision wrongly allows federal courts to be drawn into resolving an internal government "office affairs" roundtable in the name of the First Amendment, *see Connick v. Myers*, 461 U.S. 138 (1983), for purposes of decreeing a "clearly established" winner. As discussed previously herein, the record shows disputes about time and attendance for both Respondents and that the Department's provision of medical services was already subject to monitoring for verification of payroll hours. The use of the § 1983 damages remedy against individual government personnel participating in such internal debates seems far beyond what Congress could have intended. *See* U.S. Const., Amend. XIV, sec. 5 (power to enact "appropriate" legislation); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (sufficient record of First Amendment violations not established). *See also Garcetti*, 547 U.S. at 423 (rejecting construction of First Amendment that would "mandat[e] judicial oversight of communications between and among government employees and their superiors in the course of official business."). Yet that is what the decisions below allow.

The Eleventh Circuit's conclusion without analysis in this case, therefore, conflicts with decisions of the Second, Seventh, and Eighth Circuits

regarding the availability of § 1983 immunity and violates the principles established by *Safford* and *Pearson*.

D. Differences of Opinion Among Circuit Judges About the Application of the *Garcetti* Decision Warrant Certiorari Review.

This Court's opinions in *Safford* and *Pearson* each found the law not clearly established for purposes of qualified immunity in circumstances where certain nuances of the law were in a state of flux. In each case, the Court reasoned that the significant variances in decisions by the judiciary resulting from the questioned nuances rendered the law "not clearly established," indicating that the individual defendants could not have reasonably been expected to predict what the courts would do. *Safford*, 129 S.Ct. at 2644; *Pearson*, 129 S. Ct. at 823. Similarly, here, the Petitioners could not reasonably have been expected to predict how the Eleventh Circuit would interpret and apply *Garcetti* to the Respondents' speech. Certiorari should be granted to resolve these conflicts and, after *Garcetti*, the Petitioners should not be held liable for having misjudged the scope of their authority to manage the speech of public employees owing its existence to, concerning the subject matter of, and made in furtherance of, their employment.

In summary, therefore, certiorari review is appropriate and necessary because 1) there is a conflict among the circuits regarding the proper

application of *Garcetti* as it relates to the requisite specificity of job duties in relation to the government employee's speech; 2) there is a conflict among the circuits regarding the appropriate standard for determining whether an employee spoke "as a citizen;" 3) there is a conflict among the circuits regarding whether the law characterizing an employee's speech after *Garcetti* is clearly established; and 4) the Eleventh Circuit's decision and decisions from other circuits conflict with this Court's precedent regarding proper qualified immunity analysis.

II. Conflict with the First Circuit Regarding Immunity for Individual Personnel Working on Collective Decisions Warrants Certiorari Review.

Petitioners are also due immunity because they could reasonably believe that the presence of non-retaliatory motives in other persons caused the Respondents not to be hired. Despite any allegedly retaliatory motives of the Petitioners, other decision-makers were involved in the hiring process. As the district court explained, CMS was a contractor with responsibility for providing medical care to inmates in the custody of the Department. Under the CMS contract with the Department, the Department had "the right to reject any CMS personnel" so long as such rejections were not unreasonably exercised. App. 15a.

The district court found that Naglich and Ferrell had caused CMS not to hire Camp and, therefore,

had caused him to be deprived of his First Amendment rights. However, Naglich and Ferrell are entitled to immunity if a lawful basis existed in *other* decision-makers for not hiring the Respondents, because it is not clearly established that their own retaliatory motives would cause injury. *See Hartman v. Moore*, 547 U.S. 250 (2006) (reversing denial of immunity to U.S. postal inspectors in civil case after failed criminal prosecution); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Because Naglich or Ferrell could reasonably believe that the non-retaliatory motives of other persons in the hiring process caused Respondents not to be hired, they are due immunity from § 1983 damage claims.

The absence of retaliatory motives in CMS decision-makers provides the evidence needed to find Petitioners immune. The others involved in the decision-making were CMS itself and the CMS hiring manager. The manager was not a defendant; CMS, however, was a defendant and was dismissed because it was not proven to have a policy to act with a retaliatory motive protected by the First Amendment. App. 29a.

Moreover, Camp's former colleague provided an opinion to the CMS hiring manager that Camp would not work an eight-hour day consistently; that opinion was shared by Naglich and Ferrell. App. 16a-18a. The district court noted that CMS had chosen "not to pursue" hiring Camp, after receiving remarks from his former colleague. App. 48a. n7. However, the court found that Naglich caused the decision to become final by remarks made in response to

questions by the CMS hiring manager. She advised that it was 'not in our best interest" for CMS to hire Camp. App. 46a. The court also found that although Camp's time and attendance problem could have been a factor in Naglich's decision, a jury could find this to be pretext for retaliation by Naglich. App. 47a. Still, the record does not show that it would be unreasonable for Naglich to believe CMS's decision was based on grounds other than protected speech.

As for Camp's claims against Ferrell, she did not possess sufficient decision-making authority to control Camp's employment with CMS. App. 162a. According to the Amended Complaint, CMS directed that Camp not receive an offer *before* receiving any input from Ferrell. App. 125a. However, the district court did not find those facts to be material. It said that after receiving Ferrell's email in response to the former colleague's remarks about Camp's work ethic, the CMS hiring manager also directed that CMS personnel not continue to pursue Camp, and advised Camp's former colleague who first raised the objections that Camp would not be hired. App. 45a. Despite these district court findings, as a matter of law, Ferrell is due immunity from claims that her potentially retaliatory motives would cause Camp not to be hired despite the analysis of CMS personnel.

With respect to Martindale, her claims against Ferrell were dismissed. Regarding Naglich, it is undisputed that she was unaware that Martindale had filed any complaint with the Dental Board. App. 163a-164a. However, speaking with CMS personnel about Camp's problem, Naglich raised Martindale's

time and attendance problem. Naglich was not required to be consulted by CMS about Martindale. The district court, therefore, deemed Naglich's mention of Martindale as a pretext for retaliation against her, and further deemed that Naglich caused Martindale not to be hired. App. 48a.

The district court and Eleventh Circuit decisions in this case denying Petitioners immunity conflict with the decision of the First Circuit in *Philip v. Cronin*, 537 F.3d 26 (1st Cir. 2008). In *Philip*, a former contract medical examiner sued his administrator, claiming that his termination was in retaliation for two letters he sent the governor criticizing the Office of the Chief Medical Examiner. *See id.* at 28. The evidence showed that the decision to terminate the plaintiff was made at a meeting wherein a group of officials discussed the letters to the governor as well as other problems unrelated to the plaintiff's protected speech. *See id.* at 31. Under these facts, the First Circuit, with former Justice Sandra Day O'Connor sitting by designation, held that the defendant was immune from suit because the evidence showed that the decision to terminate the contract "was made not by [the defendant] alone, but in conjunction with [his] superiors." *Id.* at 34. Given that the *Philip* defendant's retaliation was not the sole cause of the adverse action, the First Circuit held that "the defendant could quite reasonably believe that this collective decision did not violate the Plaintiff's First Amendment rights." *Id.*

As in *Philip*, the decisions not to hire Respondents were not made by Petitioners alone, but in

conjunction with CMS. Petitioners' alleged retaliation was not the sole cause of the adverse actions and the Petitioners could have reasonably believed that the decisions did not violate the Respondents' First Amendment rights. The Eleventh Circuit decision in this case, therefore, conflicts with the First Circuit's decision in *Philip.*

Certiorari review is, therefore, warranted to resolve this conflict between the Eleventh and First Circuits and to prevent a departure from established principles of qualified immunity.

CONCLUSION

Petitioners urge this Court to grant a writ of certiorari, review the record of this case, and reverse the decision of the Eleventh Circuit.

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-15770-DD

D. C. Docket No. 08-00227-CV-W-N

DR. LARRY CAMP and
SABRINA MARTINDALE,

Plaintiffs-Appellant,

versus

CORRECTIONAL MEDICAL
SERVICES, INC., et al.,

Defendants-Appellees

Appeal from the United States District Court
for the Middle District of Alabama

(October, 18 2010)

(11th Cir.1996). In the present case, we do accept the facts that are set out in the district court's opinion, and we agree with the result that the district court reached.

One aspect of the reasoning in the district court's opinion warrants clarification. On the issue of whether clearly established law put Ferrell and Naglich on notice that they were violating Camp's and Martindale's First Amendment rights, the district court summarily concluded: "There can be no serious dispute that the law prohibiting state officials from retaliating against employees who engage in protected speech is 'clearly established.' " (citing *Walker v. Schwalbe,* 112 F.3d 1127, 1133 (11th Cir.1997) ("At the time the defendants acted in 1991, clearly established law informed reasonable government officials that Walker could not be punished for his First Amendment speech.")).

In *Hope v. Pelzer,* 536 U.S. 730, 741, 122 S.Ct. 2508, 2516, 153 L.Ed.2d 666 (2002), the Supreme Court held that earlier precedential decisions do not necessarily have to be "materially similar" to the case at hand in order to give fair warning for qualified immunity purposes. The Court explained that "officials can still be on notice that their conduct violates established law even in novel factual circumstances" as long as there is precedent that gives the officials "fair warning" that their conduct is unconstitutional. *Id.* Even after *Hope,* however, it is not enough to defeat a qualified immunity defense

that under the facts of the case the *Pickering*[1] balance tilts in favor of the plaintiff's free speech. Instead, the balance must tilt decidedly in favor of the plaintiff's speech in order for the defendants to have fair and clear notice that they were violating the plaintiff's constitutional rights. *See Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir.2005) ("Thus, under the facts as found by the district court at summary judgment, [the plaintiff's] interests in promoting safety and improving the competency, management, and organization of district bus drivers *far outweighed* the scant evidence that the district proffered in support of its workplace efficiency argument. We therefore conclude that the *Pickering* balance *tilted conclusively* in favor of [the plaintiff] such that the defendants had fair and clear warning that their actions were unconstitutional.") (emphasis added).

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[1] *See Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). "In *Pickering*, the landmark case concerning a public employee's [F]irst [A]mendment rights, the Supreme Court held that a public employee's interests are limited by the state's need to preserve efficient governmental functions." *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir.1989). "We must consider several factors in balancing the state's interest in efficient provision of public services against [a plaintiff's] speech interest, including: (1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Id.* at 1567.

Before the 2002 *Hope* decision, we recognized that when a public employee claims that his employer has violated his First Amendment rights, it will be a rare case in which the *Pickering* balance will tilt so obviously in the plaintiff's favor that a defendant will lose the shield of qualified immunity. *See Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1487 (11th Cir.1992) ("[I]n free-speech cases, because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where the balancing test from *Pickering* (free-speech interest of employee must be weighed against employer's interest in performing public services efficiently), would lead to the inevitable conclusion that the retaliatory action was unlawful." (citation, quotation marks, and alterations omitted)); *see also Chesser v. Sparks*, 248 F.3d 1117, 1124 (11th Cir.2001) (same); *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1298 (11th Cir.2000) ("Because *Pickering* requires a balancing of competing interests on a case-by-case basis, our decisions tilt strongly in favor of immunity by recognizing that only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated clearly established federal rights.") (quoting *Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir.1994) (alteration and quotation marks omitted)). The *Hope* decision has changed that formula somewhat, but not as much as the statement in the district court's order (quoted, ironically enough, from our own pre-*Hope* decision in *Walker*) might

indicate. The problem with the statement from the *Walker* decision is that it conflates the *Pickering* merits issue with the clearly established law issue that governs the qualified immunity defense. Even after the *Hope* decision, there will be cases in which retaliation for speech violates the First Amendment rights of the plaintiff but qualified immunity protects the defendants from a monetary judgment against them. There is a difference between the *Pickering* balance merely tilting in favor of the plaintiff and it tilting conclusively in his favor; it is the difference between the interests furthered by the plaintiff's speech merely outweighing the defendant's interests in restricting it and his interests far outweighing them.

If a case with analogous facts is needed, the *Akins* case is close enough. *See Akins v. Fulton Cnty., Ga.*, 420 F.3d 1293, 1308 (11th Cir.2005). There the plaintiffs were three public employees; two of them worked for the county purchasing department as contracting officers; the third was their immediate supervisor. *Id.* at 1298. The three of them complained about bidding irregularities to the county commissioner. *Id.* They alleged that after they spoke out about those bidding irregularities, their boss, who was the director of the county purchasing department, retaliated against them in violation of their First Amendment rights. *See id.* at 1298-99. We held in *Akins* not only that a reasonable factfinder could conclude that the director had violated the two contracting officers' First Amendment rights, *id.* at 1301, 1305, but also that the result of the *Pickering*

balancing was clear and predictable enough to defeat a motion for summary judgment based on qualified immunity. *Id.* at 1308. The same is true here.

The plaintiffs in the present case did not report bidding irregularities, but they did formally complain about Dr. West's alleged misconduct to the State Board of Dental Examiners, a neutral third party charged with overseeing the licensing and practice of dentists in Alabama. *See* Ala.Code § 34-9-2 ("The Legislature hereby declares that the practice of dentistry affects the public health, safety, and welfare and should be subject to regulation. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry in the State of Alabama. All provisions of this chapter relating to the practice of dentistry and dental hygiene shall be liberally construed to carry out these objects and purposes.") The Dental Board has the authority to discipline a dentist who "[w]illfully or negligently violates the rules of the State Department of Health or of the board regarding sanitation." *Id.* § 34-9-18(a)(8). The Board exercised that authority when it sanctioned Dr. West for the misconduct that the plaintiffs reported. A factfinder could reasonably find from the evidence that Camp and Martindale were acting as whistleblowers by

reporting unsanitary, dangerous, and brutal dentistry practices to the Dental Board.[2]

The important public interests furthered by the plaintiffs' reports far outweigh any interests the defendants had in taking the action they did against the plaintiffs, and the *Pickering* balance tilts "conclusively in favor of [the plaintiffs] such that the defendants had fair and clear warning that their

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[2]Ferrell and Naglich argue that Camp was required to report to the Dental Board as part of his professional responsibilities as a licensed dentist, so under *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), complaining to the Board was simply part of Camp's official job duties, and his speech was not protected. *See id.* at 421, 126 S.Ct. at 1960 (holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."). Alabama statutes may impose on Camp a general responsibility as a medical professional to report knowledge of other dentists' misconduct to the Dental Board, but his job responsibilities as an employee for PHS did not make reporting to the Dental Board part of his official duties. *Cf. Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir.2008) ("A statute or regulation can help determine the scope of an employee's duties to the extent that it creates responsibilities for that employee's specific job."). Camp's job responsibilities were to provide dental care to inmates at the Limestone and St. Clair facilities. The record does not indicate that Camp was responsible for overseeing the practices of other dentists at the prison facilities. In any event Dr. West was his supervisor, not his subordinate. As a dental assistant, Martindale was not licensed and would not be subject to the same rules of professional responsibility as Camp. *See* Ala. Code § 34-9-2.

actions were unconstitutional." *Cook*, 414 F.3d at 1320. The manner, time, and place of the plaintiffs' complaints to the Dental Board were appropriate and not unduly disruptive of the State's provision of public services. Their speech brought to the Dental Board's attention alleged violations of Board rules and CDC infection control policies that might not have been addressed had they refrained from complaining out of fear of retaliation.

We reach these conclusions even assuming that a claim involving only Camp's letter to the Commissioner, which refers to information that Martindale had shared with Camp, would not make it past the defendants' qualified immunity defense. We are deciding the clearly established law issue in this case based on the plaintiffs' complaints to the Dental Board, and we do not decide if we would reach the same result if the plaintiffs had complained only to the Commissioner.

AFFIRMED.

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

DR. LARRY CAMP and SABRINA MARTINDALE	)	
Plaintiffs,	)	
v.	)	Civil Action No. 08-00227-CV-W-N
CORRECTIONAL MEDICAL SERVICES, INC., ET AL.,	)	
Defendants.	)	

October 22, 2009

MEMORANDUM OPINION AND ORDER

W. KEITH WATKINS, District Judge.

Plaintiffs Dr. Larry Camp ("Camp") and Sabrina Martindale ("Martindale") (collectively "Plaintiffs") bring this action against Correctional Medical Services, Inc. ("CMS"), Richard F. Allen ("Allen"), Ruth Naglich ("Naglich"), and Laura Ferrell ("Ferrell"),[1] alleging First Amendment violations under 42 U.S.C. § 1983 and various state law claims. (Am. Compl. (Doc. # 37).) This cause is before the court on Plaintiffs' motion for partial summary judgment on Camp's § 1983 claims (Doc. # 69), CMS's motion for summary judgment on all claims (Docs. # 70, 71), and Allen, Naglich, and Ferrell's (collectively "the ADOC defendants") motion for summary judgment on all claims (Docs. # 73, 74). After careful consideration of counsels' briefs, the relevant law, and the record as a whole, the court finds that Camp's motion is due to be denied, CMS's motion is due to be granted, and the ADOC defendants' motion is due to be granted in part and denied in part.

I. JURISDICTION AND VENUE

The parties do not dispute subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367; nor do the parties contest personal jurisdiction or venue. There are adequate allegations in support of each.

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[1]Plaintiffs have sued Allen, Naglich, and Ferrell in their individual and official capacities. (Am. Compl.)

II. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of CMS's failure to hire Camp and Martindale to the positions of dentist and dental assistant, respectively, at the Limestone Correctional Facility ("Limestone Facility"). Plaintiffs allege that the hiring decisions were in retaliation for prior complaints made by Plaintiffs concerning a supervisor's alleged "improper and unethical" practices. The evidentiary submissions of the parties establish the following facts.

A. Factual Background

1. Camp's and Martindale's Previous Employment with NaphCare and PHS

The Alabama Department of Corrections ("ADOC") contracts with private companies to provide medical and dental services to the state's inmate population. In July 2002, one such company, NaphCare, Inc. ("NaphCare"), hired Camp to provide dental services to inmates at the Limestone and St. Clair Correctional facilities in Alabama. (Camp Aff. ¶ 5, Feb. 4, 2009 ("Camp Aff. I") (Ex. A to Pls.' Summ. J. Br.).) In February 2003, NaphCare hired Martindale to work as a dental assistant at the Limestone Facility. (Martindale Aff. ¶ 3, Feb. 5, 2009 ("Martindale Aff. I") (Ex. B to Pls.' Summ. J. Br.).) Upon replacing NaphCare as the state's contractor in November 2003, Prison Health Services, Inc. ("PHS") hired both Camp and Martindale to continue

providing dental services at the Limestone Facility. (Camp Aff. I¶ 5; Martindale Aff. I¶ 3.)[2]

While employed by PHS at the Limestone Facility, Camp and Martindale independently filed complaints against the Director of Dental Services, Dr. David Michael West ("West"). Camp sent a letter to PHS's Regional Medical Director and the Commissioner of the ADOC on December 11, 2003. (Letter from Camp. to Dr. Will Mosier, Dec. 11, 2003 ("Camp letter") (Ex. 1 to Camp Aff. I).) He sent a formal complaint to the Board of Dental Examiners of Alabama ("Dental Board") on December 17, 2003 (Complaint from Camp to the Dental Board, Dec. 17, 2003. ("Camp complaint") (Ex. 2 to Camp Aff. I).) Camp's letter and complaint stated that West used "brutal and painful" methods for the purpose of reducing demand for dental services, that West did not properly sterilize equipment, and that West failed

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[2]It is unclear whether Camp and Martindale worked as employees of PHS, or as independent contractors of PHS. Although the evidence shows that Camp would have been an independent contractor had he been retained by CMS (Meeker Aff. ¶ 6 (Ex. A to CMS Summ. J. Br.); Ray Dep. 12 (Ex. F to CMS Summ. J. Br.)), there is no evidence establishing that Camp and/or Martindale were independent contractors when they worked for PHS. Both Camp's and Martindale's affidavits state that they were employees. (Camp Aff. ¶ 3, Mar. 9, 2009 ("Camp Aff. II") (Ex. D to Pls.' Resp. Br.); Martindale Aff. ¶ 3, Mar. 10, 2009 ("Martindale Aff. II") (Ex. C to Pls.' Resp. Br.).) Thus, the court proceeds under the assumption that both Camp and Martindale were employees of PHS when the alleged protected speech occurred.

to maintain adequate supplies for the site. (Camp letter; Camp complaint.) Martindale's complaint-addressed to the Dental Board on January 2, 2004-discussed a specific incident during which West allegedly insisted upon using unsterilized equipment. (Complaint from Martindale to the Dental Board, Jan. 2, 2004 ("Martindale complaint") (Ex. 1 to Martindale Aff. I).) West was ultimately sanctioned by the Dental Board for "fail[ure] to meet or comply with the current recommendations of the Centers for Disease Control and Prevention's Recommended Infection-Control Practices for Dentistry." (Dental Board Am. Order, Sept. 8, 2005 (Ex. 4 to Camp Aff. I).)

Less than one month after filing the complaints, Ferrell, who was at that time a Regional Vice President for PHS (Martindale Dep. 78 (Ex. J to CMS Summ. J. Br.)), notified Camp that his job had been terminated. (Camp Aff. I ¶ 11.) Ferrell claims that the termination was based on Camp's failure to abide by company policy and failure to work the requisite hours. (*See* West Dep. 203) (Ex. 11 to ADOC Defs.' Summ. J. Br. (stating that West reported to Ferrell that Camp was not fulfilling his time obligations).) Ferrell was, however, aware of Camp's complaints at the time. When asked whether she "didn't like" that Camp wrote a letter to the ADOC about violations of clinical procedure, Ferrell responded: "I don't like that as a regional vice president that I was shown a letter of complaints in front of my client." (Ferrell Dep. 219 (Ex. J to Pls.' Summ. J. Br.).) Camp claims that Ferrell told him

that the reason for his termination was his "failure to follow policies and procedures and not following [the] chain of command." (Camp Dep. 212, Nov. 21, 2008 ("Camp Dep. I") (Ex. H to CMS Summ. J. Br.).)

On December 13, 2004, Ferrell discharged Martindale for allegedly falsifying her time records. (Martindale Dep. 241.)

2. Camp's Application with CMS

On November 1, 2007, CMS contracted with the ADOC to provide healthcare services for the Alabama prison system. (Linton Aff. ¶ 3 (Ex. B to CMS Summ. J. Br.).) The ADOC-CMS contract grants the ADOC the authority to reject personnel proposed by CMS. Specifically, the contract states, "The ADOC reserves the right to reject any CMS personnel .... Any such rejections shall not be unreasonably exercised by the ADOC." (Health Services Agreement between the ADOC and CMS, Nov. 1, 2007 ("ADOC-CMS contract") (Ex. 24 to Linton Dep., Sept. 11, 2008 ("Linton Dep. I") (Ex. C to CMS Summ. J. Br.)).) In September 2007, after receiving notification of the ADOC's intent to contract with CMS, CMS set about hiring "approximately 543 individuals." (Linton Aff. ¶ 3.) CMS retains physicians, dentists, and "other medical specialists" as independent contractors, not employees. (Meeker Aff. ¶ 6; Ray Dep. 12.) Camp submitted his application for a dental position with CMS on October 10, 2007 (Camp application, Oct. 10, 2007 (Ex. 1 to Camp Dep. I)), and interviewed with the

"I heard Dr. Camp has a history in Alabama. He wants to work for us at Limestone-any guidance?" (Email from Linton to Naglich, Ferrell, and Kinard, Oct. 15, 2007, 5:16 p.m. (Ex. 21 to Linton Dep. II).) Ferrell, who, having formerly worked with Camp and Martindale at PHS, had become the ADOC's Medical Systems Administrator (Ferrell Dep. 13 (Ex. M to CMS Summ. J. Br.)), responded to Linton's email, writing "Absolutely not!" and "This is the one who had us all before the State Dental Board [w/]r/t Dr. Mike West." (Email from Ferrell to Linton, Naglich, and Kinard, Oct. 16, 2007, 8:50 a.m.) (Ex. 21 to Linton Dep. I.); email from Ferrell to Linton, Oct. 16, 2007, 8:55 a.m. (Ex. 21 to Linton Dep. I.).) When asked for the basis of her email to Linton, Ferrell testified during her deposition that "Dr. Camp had an issue with his timekeeping previously; Dr. Camp did not work well with his profe ssional associates; he did not take instruction well; and Dr. Camp was an independent operator." (Ferrell Dep. 218 (Ex. 5 to ADOC Defs.' Summ. J. Br.).) After receiving Ferrell's emails, Linton requested that Ray "not continue [to] pursue Dr. Camp." (Email from Linton to Ray, Oct. 16, 2007, 10:07 a.m. (Ex. 21 to Linton Dep. I).)

Naglich, the ADOC's Associate Commissioner of Health Services (Naglich Dep. 38 (Ex. L to CMS Summ. J. Br.)), responded to Linton's email on October 26, 2007, stating that it was "[n]ot in our best interest" to hire Camp. (Email from Naglich to Linton, Oct. 26, 2007, 4:31 p.m. (Ex. R to Pls.' Summ. J. Br.).) Subsequently, Linton had a conversation with Naglich, during which Naglich discussed Camp's

alleged "time and attendance issues" while employed at PHS. (Linton Dep. I 99, 329, 341-43.) At the time she made the recommendation not to hire Camp, Naglich had never personally worked with or supervised Camp and had no personal knowledge of any complaints filed against him. (Naglich Dep. 20-22 (Ex. D to Pls.' Summ. J. Br.).) She was, however, aware of the letter that Camp had sent to the ADOC commissioner and that a complaint had been filed against Dr. West. (Naglich Dep. 100-101, 104 (Ex. D to Pls.' Summ. J. Br.).) According to Naglich, the basis for her recommendation not to hire Camp was a prior conversation with PHS's chief operating officer, during which Naglich learned that Camp had been terminated by PHS for failure to work the required hours and for "fraudulent reporting of hours." (Naglich Dep. 96-97, 99-100, 178-79 (Ex. L to CMS Summ. J. Br.).) Linton asserts that the final decision regarding Camp's employment was made after hearing from Naglich. (Linton Dep. I 329, 341-43; *see also* Linton Dep. II 114 (Ex. M to Pls.' Summ. J. Br.) ("[I]f the client doesn't want to hire someone, ... then we won't hire someone....").) Ray notified Camp of the decision not to hire him in late October. (Camp Dep. I 251-52.)

Camp contends that he contacted Allen to report his concerns that the decision not to hire him at the Limestone Facility was in retaliation for his

complaint against West. (Camp Aff. ¶ 25 [3]; Naglich Dep. 193 (Ex. D to Pls.' Summ. J. Br.).) Allen notified Naglich of Camp's allegations (Naglich Dep. 193-94 (Ex. D to Pls.' Summ. J. Br.)), and Naglich responded by stating that she would have the site reviewed and look into any grievances or complaints (Naglich Dep. 194 (Ex. D to Pls.' Summ. J. Br.)).

Upon learning of Camp's complaint to Allen, Linton sent an email to his supervisor stating, "One candidate-Camp-has a history and is not allowed back by ADOC. This is a good thing as he is bad news administratively. He thinks nothing of going around us to the commissioner and has recently done so. Smart commissioner, foolish him." (Email from Linton to J.M. Courtney, Jan. 5, 2008, 1:20 p.m. (Ex. V to Pls.' Summ. J. Br.).)

3. Martindale's Application with CMS

In late October 2007, Martindale interviewed for a dental assistant position with Debbie Hunt Vaughn, the Health Services Administrator at the Limestone Facility. (Vaughn Dep. 47 (Ex. G to CMS Summ. J. Br.).) Martindale claims that Vaughn offered her the position during the interview (Martindale Dep. 101); however, Vaughn asserts that she did not have the power to offer Martindale the job at that point because she was not the ultimate

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[3]The ADOC defendants' motion to strike paragraph 25 of Camp's affidavit is addressed in section (IV)(B)(2)(c)(iii) n. 8, *infra*.

decisionmaker. (Vaughn Dep. 15-16.) Further, Vaughn maintains that she could not offer the job "for sure" because she did not know the start date at the time of the interview. (Vaughn Dep. 48, 112.)

The decision not to hire Martindale was made after Linton's conversation with Naglich regarding Camp. Naglich, who had never worked with Martindale, brought up Martindale's name during this conversation, mentioning that she had also been let go from PHS due to "time and attendance" issues. (Linton Dep. I 99; Naglich Dep. 26 (Ex. D to Pls.' Summ. J. Br.).) After this conversation, Linton contacted Vaughn and told her that CMS would not retain Martindale. (Linton Dep. I 98-99.)

B. Procedural Background

Plaintiffs filed their Complaint on March 27, 2008 (Doc. # 2) and an Amended Complaint on November 10, 2008. (Doc. # 37.) Plaintiffs' Amended Complaint alleges: (1) 42 U.S.C. § 1983 First Amendment retaliation against all Defendants, (2) tortious interference with business and employment relations against the ADOC defendants, (3) fraud against CMS, (4) slander per se against Naglich, (5) the tort of outrage against all Defendants, (6) negligent and/or wanton supervision and retention against CMS, (7) wanton supervision and retention against Naglich, (8) wanton supervision and retention against Allen, and (9) civil conspiracy against CMS, Ferrell, and Naglich.

Plaintiffs moved for summary judgment on Camp's § 1983 claims against all Defendants.[4] CMS and the ADOC defendants subsequently moved for summary judgment on all Plaintiffs' claims. (Docs. # 71, 74.)

III. STANDARD OF REVIEW

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Greenberg v. BellSouth Telecomms., Inc.*, 498 F.3d 1258, 1263 (11th Cir.2007) (*per curiam*) (citation to former rule omitted); Fed.R.Civ.P. Rule 56(c) (Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."). The party moving for summary judgment "always bears the initial responsibility of informing the district court of the

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[4]Because CMS's motion for summary judgment on both Camp's and Martindale's claims will be granted, Plaintiffs' motion for summary judgment on Camp's § 1983 claim against CMS will not be reached. Furthermore, to the extent the ADOC defendants' motion for summary judgment is denied, genuine issues of material fact exist. Therefore, Plaintiffs' motion for summary judgment on Camp's § 1983 claims against the ADOC defendants is not reached.

basis for its motion, and identifying those portions of [the record, including pleadings, discovery materials and affidavits], which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The movant may meet this burden by presenting evidence indicating there is no dispute of material fact or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* at 322-24, 106 S.Ct. 2548.

If the movant meets its evidentiary burden, the burden shifts to the nonmoving party to establish, with evidence beyond the pleadings, that a genuine issue material to each of its claims for relief exists. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991); *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. 2548; Fed. R. Civ. P 56(e)(2) ("When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must ... set out specific facts showing a genuine issue for trial."). What is material is determined by the substantive law applicable to the case. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505; *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 809 (11th Cir.2004) ("Only factual disputes that are material under the substantive law governing the case will preclude entry of summary judgment."). Furthermore, "[t]he mere existence of some factual dispute will not defeat

summary judgment unless that factual dispute is material to an issue affecting the outcome of the case." *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1243 (11th Cir.2003) (*per curiam*) (internal quotation marks and citation omitted).

A genuine issue of material fact exists when the nonmoving party produces evidence that would allow a reasonable fact-finder to return a verdict in its favor. *Greenberg*, 498 F.3d at 1263; *Waddell v. Valley Forge Dental Assocs.*, 276 F.3d 1275, 1279 (11th Cir.2001) (to establish a genuine issue of material fact, the nonmoving party must produce evidence such that a reasonable trier of fact could return a verdict in his favor). However, if the evidence on which the nonmoving party relies, "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citations omitted). "A mere 'scintilla' of evidence supporting the [nonmovant's] position will not suffice; there must be enough of a showing that the [trier of fact] could reasonably find for that party," *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir.1990) (citing *Anderson*, 477 U.S. at 251, 106 S.Ct. 2505), and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Conclusory allegations based on subjective beliefs are likewise insufficient to create a genuine issue of material fact and do not suffice to oppose a

motion for summary judgment. *Holifield v. Reno,* 115 F.3d 1555, 1564 n. 6 (11th Cir.1997) (*per curiam*) (A plaintiff's "conclusory assertions ... in the absence of supporting evidence, are insufficient to withstand summary judgment."). Hence, when a plaintiff fails to set forth specific facts supported by appropriate evidence sufficient to establish the existence of an element essential to his case and on which the plaintiff will bear the burden of proof at trial, summary judgment is due to be granted in favor of the moving party. *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548 ("[F]ailure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

Thus, in cases where the evidence before the court is admissible on its face or can be reduced to admissible form and indicates there is no genuine issue of material fact, and where the party moving for summary judgment is entitled to it as a matter of law, summary judgment is proper. *Celotex Corp.*, 477 U.S. at 323-24, 106 S.Ct. 2548 (summary judgment appropriate where pleadings, evidentiary materials and affidavits before the court show there is no genuine issue as to a requisite material fact).

IV. DISCUSSION

The parties bring cross-motions for summary judgment. Plaintiffs move for summary judgment on Camp's § 1983 First Amendment retaliation claims; CMS and the ADOC defendants move for summary judgment on all Plaintiffs' claims.

A. *Plaintiffs' § 1983 Claim Against CMS*

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law [or] a suit in equity....

42 U.S.C. § 1983. Thus, to establish a claim under § 1983, Plaintiffs must show: (1) a violation of a constitutional right and (2) that the violation was committed by a person acting under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 49-50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999).

Addressed as a threshold matter is CMS's argument that Plaintiffs' § 1983 First Amendment retaliation claim against CMS fails as a matter of law under *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

In *Monell,* the Supreme Court held that a state actor "cannot be held liable under § 1983 on a *respondeat superior* theory." 436 U.S. at 691, 98 S.Ct. 2018. Instead, such liability must be predicated on an official policy or custom. *Id.* at 694, 98 S.Ct. 2018. In other words, a government entity may be held liable

"when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* The Eleventh Circuit has expanded this notion to include private entities. *Buckner v. Toro,* 116 F.3d 450, 453 (11th Cir.1997) ("[T]he *Monell* policy or custom requirement applies in suits against private entities performing functions traditionally within the exclusive prerogative of the state, such as the provision of medical care to inmates."); *see also Harvey v. Harvey,* 949 F.2d 1127, 1129 (11th Cir.1992) ("*Monell* involved a municipal corporation, but every circuit court to consider the issue has extended the holding to private corporations as well."). Thus, to the extent CMS's liability is based solely on the actions of its employees-specifically, the hiring decisions made by CMS employee Linton-Plaintiffs' § 1983 First Amendment retaliation claim cannot stand. On the other hand, if there exists a genuine issue of material fact as to the existence of an official policy or custom constituting "deliberate indifference" to the constitutional right at issue, or if an official "policymaker's" actions deprived Plaintiffs of their constitutional rights, summary judgment on this basis is inappropriate. *McDowell v. Brown,* 392 F.3d 1283, 1289 (11th Cir.2004).

The Eleventh Circuit has articulated three ways a plaintiff can meet his or her burden under *Monell.* To survive summary judgment, a plaintiff must identify: (1) an official policy, (2) a settled

custom, or (3) the actions of a "policymaker" that caused the alleged constitutional violation. *Garvie v. City of Ft. Walton Beach,* 366 F.3d 1186, 1188 (11th Cir.2004). Plaintiffs allege all three.

According to Plaintiffs, CMS's practice of acquiescing to the ADOC's hiring decisions caused the alleged constitutional violations. (*See* Pls.' Reply 5 (Doc. # 107) ("CMS's policy and custom of blindly following the directives of the ADOC (even where the directives are unlawful), which Linton complied with, renders CMS liable to Dr. Camp under § 1983.").) This "policy and custom" of following the ADOC's directives arises from CMS's contract with the ADOC, which gives the latter ultimate authority to reject candidates for employment. (*See* ADOC-CMS contract ("The ADOC reserves the right to reject any CMS personnel....").) Plaintiffs assert that "but for" this policy and custom, CMS would have hired Camp and Martindale. (*See* Pls.' Reply 4.) However, mere causation is insufficient to establish liability under *Monell.* Where the policy or custom in question is constitutional on its face,[5] Plaintiffs must show that

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[5]There can be no doubt that the contractual provision at issue here is constitutional on its face. The contract expressly states that the ADOC will not exercise its authority "unreasonably." (ADOCCMS contract.) Moreover, courts have long-recognized the unique circumstances surrounding prison administration. *Washington v. Harper,* 494 U.S. 210, 223, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); *see also Evans v. Stephens,* 407 F.3d 1272, 1289 (11th Cir.2005) (*en banc*) (Carnes, J., concurring) ("[D]etention facility officials have a legal obligation to ensure, to the extent reasonably feasible, that their facilities are safe not

the "facially valid action"-*i.e.*, entering into a contract that gives the ADOC ultimate hiring authority over medical and dental personnel working in Alabama prisons-was " 'taken with "deliberate indifference" as to its known or obvious consequences.' " *McDowell,* 392 F.3d at 1291 (quoting *Bd. of County Comm'rs v. Brown,* 520 U.S. 397, 407, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (quoting *City of Canton v. Harris,* 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989))).

In *McDowell,* the Eleventh Circuit held that the county's violation of a prisoner's constitutional right to medical care was not a "highly predictable consequence" of the county's failure to provide an adequate budget for medical staff. 392 F.3d at 1292. In reaching this conclusion, the court discussed the lack of evidence identifying a "pattern of injuries." *Id.* at 1291. Without evidence of previous violations of federally protected rights, the county "had no notice of the consequences" of its budgetary decision. *Id.*

As in *McDowell,* the alleged constitutional violation in this case was not a "highly predictable consequence" of the policy at issue-the contractual provision giving the ADOC ultimate hiring authority. Here, Plaintiffs allege that in agreeing to the aforementioned contractual provision, CMS was "deliberate[ly] indifferent" to the "known or obvious

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only for those detained but also for those who work there and those who visit."). Safety concerns necessitate oversight with respect to who is hired to work in Alabama prisons.

consequences" that the ADOC could direct CMS to act unlawfully. (*See* Pls.' Reply 4.) However, Plaintiffs point to no evidence of past constitutional violations resulting from the policy decision. *See McDowell,* 392 F.3d at 1291. The express language of the contract further undermines Plaintiffs' contention that CMS had the requisite culpability in entering the contract: The contract expressly limits the ADOC's ability to reject candidates for employment by mandating that "[a]ny such rejections shall not be unreasonably exercised by the ADOC." (ADOC-CMS contract.) Thus, Plaintiffs have failed to meet their burden of showing that there are genuine issues of material fact as to the existence of a policy or custom giving rise to *Monell* liability.

Plaintiffs claim, in the alternative, that CMS should be held liable for the unconstitutional actions of its policymakers. As Plaintiffs contend, liability may also be imposed under *Monell* for the decisions or actions of policymakers within the organization. *See Pembaur v. City of Cincinnati,* 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) ("*Monell's* language makes clear that it expressly envisioned other officials 'whose acts or edicts may fairly be said to represent official policy,' and whose decisions therefore may give rise to municipal liability under § 1983.") (quoting *Monell,* 436 U.S. at 694, 98 S.Ct. 2018) (internal citation omitted). However, "liability attaches only where the decisionmaker possesses final authority to establish ... policy with respect to the action ordered." *Id.* at 481, 106 S.Ct. 1292.

B. Plaintiffs' § 1983 Claims Against the ADOC Defendants

The ADOC defendants contend that they are immune from suit in their individual capacities under the doctrine of qualified immunity. Qualified immunity protects government officials performing discretionary functions from liability for civil damages, so long as their conduct does not violate " 'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 801, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Before inquiring into the particular constitutional rights at issue, the court must determine whether the officials have met their burden in establishing that " '[they were] acting within the scope of [their] discretionary authority when the allegedly wrongful acts occurred.' " *McCullough v. Antolini,* 559 F.3d 1201, 1205 (11th Cir.2009) (quoting *Lee v. Ferraro,* 284 F.3d 1188, 1194 (11th Cir.2002)). If the court finds that the officials were acting within their discretionary authority, the burden shifts to the plaintiffs to show that the defendants are not entitled to qualified immunity. *Id.* (citing *Lee,* 284 F.3d at 1194). To meet their burden, Plaintiffs must satisfy both elements of the test laid out in *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

In *Saucier,* the United States Supreme Court mandated a two-step process for resolving government officials' qualified immunity claims. 533 U.S. at 201, 121 S.Ct. 2151. The Court held that the

threshold question in qualified immunity cases is whether the facts, taken in the light most favorable to the plaintiff, show the violation of a constitutional right. *Id.* Second, "if a violation could be made out," the court must determine whether the right at issue was "clearly established." *Id.* On reconsidering this stringent two-step process, the Supreme Court in *Pearson v. Callahan* concluded that, "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory." --- U.S. ----, 129 ***1353** S.Ct. 808, 818, 172 L.Ed.2d 565 (2009). Instead, judges of the lower courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.*

1. Discretionary Authority

The first consideration is whether the ADOC defendants met their burden of showing that they were acting within their "discretionary authority" when the alleged constitutional violations occurred. The proper inquiry is twofold: (1) whether the government employee was "performing a legitimate job-related function (that is, pursuing a job-related goal)" and (2) whether the government employee, in pursuit of this legitimate job-related function, used "means that were within his power to utilize." *Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir.2004).

With respect to Allen, the alleged constitutional violations concern his "ratification" of the hiring decisions and his alleged failure to investigate Camp's complaints. As the Commissioner, Allen heads the ADOC and exerts "independent direction, supervision and control." Ala.Code § 14-1-1.3 (1975). Thus, the hiring decisions and any alleged failure to investigate said hiring decisions fall squarely within Allen's "legitimate job description." *Holloman*, 370 F.3d at 1266. Similarly, the means used in executing these functions, *i.e.*, dispatching subordinates to investigate complaints and otherwise communicating with other ADOC and CMS employees, do not fall outside Allen's discretionary authority. *See id.* at 1267. Accordingly, the court finds that Allen has met his burden of establishing that he was acting within the scope of his discretionary authority when the alleged unconstitutional acts occurred.

Naglich and Ferrell likewise have met their burden. Naglich, as Associate Commissioner of Health Services, is in charge of "every aspect" of the ADOC's health services program. (Allen Dep. 21 (Ex. 3 to ADOC Defs.' Summ. J. Br.).) Ferrell, as the ADOC's Medical Services Administrator, is "part of a team that oversees" the provision of medical and dental services to Alabama state prisons. (Naglich Dep. 35-36 (Ex. 4 to ADOC Defs.' Summ. J. Br.).) Providing recommendations-or as Plaintiffs contend, making the ultimate decision-as to who is and is not hired to work as medical providers in Alabama state prisons-the crux of Plaintiffs' constitutional claims

against Naglich and Ferrell is a "legitimate job-related function." *Holloman*, 370 F.3d at 1266. By communicating these recommendations and/or hiring decisions to CMS employees, Naglich and Ferrell used the reasonable means at their disposal in executing their legitimate job functions. *Id.* at 1265.

2. Constitutional Violation

The burden then shifts to Plaintiffs, who must show the existence of genuine issues of material fact as to whether the ADOC defendants violated Plaintiffs' constitutional rights. *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. Because the government has an interest in "promoting the efficiency of the public services it performs through its employees," government employers are afforded more discretion in regulating or prohibiting the speech of their employees. *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Boyce v. Andrew*, 510 F.3d 1333, 1341 (11th Cir.2007). A public employer, such as the ADOC, may have important reasons for regulating speech in the form of an adverse employment action such as termination, failure to promote, or failure to hire that do not apply in the private citizen context. Thus, Plaintiffs' burden depends on whether they acted as public employees or private citizens when engaging in the speech at issue.

Plaintiffs assert that their complaints were made while working as employees of a private

organization, PHS, and that they should therefore be treated as private citizens for purposes of their First Amendment retaliation claim. The ADOC defendants, on the other hand, contend that the Supreme Court's decision in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*-equating government contractors to government employees for purposes of First Amendment retaliation claims-requires the court to apply the public employees test. 518 U.S. 668, 678-79, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996).

The issue in *Umbehr* was "whether, and to what extent, the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech." *Id.* at 670, 116 S.Ct. 2342. In finding that the public employee test of *Pickering* should apply, the court looked to the "closeness" of the Plaintiff contractor and the government. *Id.* at 680, 88 S.Ct. 1731. According to the Court, "Independent contractors appear to us to lie somewhere between the case of government employees, who have the closest relationship with the government, and our other unconstitutional conditions precedents, which involve persons with less close relationships with the government." *Id.* Thus, the relevant inquiry in this case concerns the relationship between Plaintiffs and the state of Alabama.

Plaintiffs had a sufficiently close and dependent relationship with the government such

that they should be considered public employees for the purpose of their First Amendment retaliation claims. Although Plaintiffs were not in a direct contractual relationship with the ADOC, they worked for PHS (an ADOC contractor), they worked in the Alabama state prisons on Alabama state prisoners, and they were subject to the ADOC's hiring decisions. Furthermore, when asked whether "the rules that apply to providing patient care differ in the correctional setting than in the private setting," Camp testified that the services, security, scheduling, and administrative procedures differ in a correctional setting. (Camp Dep. I 98-99.) While they may have received their paychecks from PHS, Plaintiffs clearly worked within the confines of the Alabama prison system. For these reasons, the court applies the "public employee" test.[6]

To state a retaliation claim, a public employee must show: 1) "that the speech can be fairly characterized as relating to a matter of public concern, 2) that her interests as a citizen outweigh the interests of the State as an employer, and 3) that

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[6]To the extent Plaintiffs have met their burden under the public employee test, they necessarily would have met their burden under the less-stringent private employee test. To state a retaliation claim, a private citizen must only establish: (1) that his or her "speech or act was constitutionally protected"; (2) "that the defendant's retaliatory conduct adversely affected the protected speech"; and (3) "that there is a causal connection between the retaliatory actions and the adverse effect on speech." *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir.2005).

the speech played a substantial or motivating role in the government's decision to take an adverse employment action." *Akins v. Fulton*, 420 F.3d 1293, 1303 (11th Cir.2005). If the plaintiff establishes the first three elements, the burden "shifts to the employer to show by a preponderance of the evidence that it would have made the same decision even in the absence of the protected speech." *Cook v. Gwinnett County Sch. Dist.*, 414 F.3d 1313, 1318 (11th Cir.2005). "The first two steps are questions of law; the final two steps are 'questions of fact designed to determine whether the alleged adverse employment action was in retaliation for the protected speech.' " *Id.* (quoting *Anderson v. Burke County, Ga.*, 239 F.3d 1216, 1219-20 (11th Cir.2001)).

a. Citizen Speaking on a Matter of Public Concern

The first prong of the public employee test concerns whether the public employee was speaking as a citizen on a matter of public concern. *Akins*, 420 F.3d at 1303. Whether an employee's speech addresses a matter of public concern is determined by the "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). "Public concern" is defined as speech that " 'relate[s] to a matter of political, social, or other concern to the community.' " *Akins*, 420 F.3d at 1304 (quoting *Watkins v. Bowden*, 105 F.3d 1344, 1352 (11th Cir.1997)). Because " 'an employee's speech will rarely be entirely private or entirely public,' " it is

protected so long as the "main thrust" of the speech is on a matter of public concern. *Id.* (quoting *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir.1993)).

The ADOC defendants contend that the real motivation behind Camp's complaints was his dissatisfaction with West's leadership and concern over pay. (ADOC Defs.' Summ. J. Br. 55.) Camp's letter to PHS and the ADOC begins by addressing the "[c]urrent shortcomings in supply, equipment, lab/prosthetic support and personnel [that] are adversely affecting the quality and quantity of dental health care available to the inmate population in the state system." He goes on to describe West's "[f]ailure of leadership," giving specific examples of allegedly unsanitary and brutal practices. Camp then discusses the staff shortages at the Limestone Facility and his unwillingness to accept a pay reduction offered by West. He ends the letter by stating that "[c]urrent dental conditions within [the ADOC] are not conducive to attract and retain quality personnel and I will soon leave if conditions do not change." (Camp letter (Ex. 1 to Camp Aff. I).)

Camp does, to some extent, incorporate personal employment grievances into his letter; however, the court finds that the "main thrust" of the speech relates to a matter of public concern-the health of Alabama inmates and the public at large. Both Camp and Martindale raise concerns about the Director of Dental Services' allegedly unsanitary and cruel practices. Notably, both Camp and Martindale detail West's allege use of unsterilized equipment.

According to the testimony by Dr. Janine Jason, such practices significantly increase the risk of transmitting HIV among prison inmates and the public as a whole. (*See* Jason Dep. 281-82 (Ex. B to Pls.' Reply Br.) (stating that the risk of HIV transmission "is over 37 times greater" if the guidelines are not followed).) Certainly, a dentist's alleged failure to comply with the Centers for Disease Control's Recommended Infection-Control Practices is a matter of public concern. (*See* Dental Board Am. Order (stating that Dr. West was sanctioned for failing to comply with these guidelines); *see also Cook*, 414 F.3d at 1319 ("In various contexts, we have made it clear that speech relating to the safety of the public involves a matter of public concern.").)

This does not end the inquiry, however. In *Garcetti v. Ceballos*, the Supreme Court limited the constitutional protection afforded government employees by holding that the First Amendment does not protect an employee speaking as part of his or her official job duties. 547 U.S. 410, 423, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). In that case, a deputy district attorney filed a § 1983 claim for First Amendment retaliation, alleging that he suffered an adverse employment action after writing a memorandum that recommended dismissal of a case on the basis of government misconduct. *Id.* at 414-15, 126 S.Ct. 1951. The Supreme Court, in a 5-4 opinion, found that Garcetti had acted "pursuant to his duties as a calendar deputy." *Id.* at 421, 126 S.Ct. 1951. In writing the memorandum, the deputy district attorney was merely conducting his "daily

professional activities" and performing the "tasks he was paid to perform," *id.* at 422, 126 S.Ct. 1951, with the result that his speech was not protected.

The ADOC defendants contend that Plaintiffs merely reported that which they had an obligation to report, and, as a result, are not entitled to First Amendment protection under *Garcetti.* The ADOC defendants offer Camp's testimony as evidence that he had an official duty to report misconduct to the Dental Board. (*See* Camp Dep. I 178) (Ex. 1 to ADOC Defs.' Summ. J. Br.) (stating that Camp believed it was his professional obligation as a licensed dentist to report such "egregious" acts to the Dental Board). However, Camp states in his affidavit that he also communicated his concerns to the then-Commissioner of the ADOC, Mr. Donal Campbell ("Campbell"). In fact, Camp sent a carbon copy of the letter to Campbell. (Camp letter (Ex. 1 to Camp Aff. I).) The ADOC defendants offer no evidence of Camp's professional obligation to report such conduct to the ADOC Commissioner. Regarding Martindale's speech, the only evidence that Martindale had a professional obligation to report misconduct to the Dental Board is her deposition testimony in which she states that she *felt* she had an obligation to report misconduct. (Martindale Dep. 210-11 (Ex. 2 to ADOC Defs.' Summ. J. Br.).) A "feeling" of obligation to report misconduct does not necessarily equate to a "professional duty" to do so.

However, "[t]hat the plaintiffs had no affirmative duty to go outside the formal chain of

command ... does not convert their speech to that of a private citizen." *Akins v. Fulton County, Ga.,* 278 Fed.Appx. 964, 971 (11th Cir.2008). As the Supreme Court has held:

> The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description *is neither necessary nor sufficient* to demonstrate that conducting the task is within the scope of the employee's professional duties.

Garcetti, 547 U.S. at 424-25, 126 S.Ct. 1951 (emphasis added). Thus, while relevant, the formally adopted policies and procedures are not determinative. In *Akins,* the plaintiffs, ex-employees in a county's purchasing department, went outside the chain of command to report irregularities in the bidding process. 278 Fed.Appx. at 970-71. In holding that the plaintiffs spoke as public employees rather than as private citizens, the court noted that the plaintiffs were ultimately concerned with the "in-house procedure," *i.e.,* complying with the departments "basic instructions to bidders." *Id.* at 971. Here, on the other hand, Plaintiffs' complaints have more to do with prisoner care than the integrity of company policies. Thus, Plaintiffs were acting as private citizens when they complained outside the "chain of command."

Moreover, the court is not convinced that Camp's communications made pursuant to a general policy requiring that dentists report misconduct to PHS and the Dental Board-*i.e.*, "inside the chain of command"-are sufficient to bring Camp's letter and complaint within the ambit of unprotected speech. Unlike the plaintiff in *Garcetti,* Camp was not engaged in "daily professional activity" when he made the complaints. Writing disposition memoranda was part of the job Garcetti "was paid to do"; Camp was hired to provide dental services to Alabama inmates, not issue reports of dental practices. In articulating the policy behind its new bright-line rule, the Supreme Court in *Garcetti* stated that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen [; i]t simply reflects the exercise of employer control over what the employer itself has commissioned or created." 547 U.S. at 421-22, 126 S.Ct. 1951. The speech at issue in this case does not "owe[ ] its existence" to Camp's and Martindale's professional obligations; instead, concern over the standard of dental care provided to Alabama inmates appears to be the basis for the speech. *Cf. Hartwell v. City of Montgomery,* 487 F.Supp.2d 1313, 1325 (M.D.Ala.2007) (finding that the plaintiff's complaint was protected under the First Amendment because reporting a co-worker for violating a department tattoo policy was not part of the plaintiff's "official duties"). Thus, Plaintiffs spoke as citizens on a matter of public concern when

making the complaints to PHS, the Dental Board, and the ADOC.

b. Balancing the Interests of the Citizen and the State

The next determination is whether Plaintiffs' "interests as ... citizen[s] outweigh the interests of the State as an employer." *Akins,* 420 F.3d at 1303. This balance requires that the court take "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick,* 461 U.S. at 150, 103 S.Ct. 1684.

As discussed above, Plaintiffs' interests relate to the health and treatment of Alabama inmates. Protecting those who report government wrongdoing is a "core concern" of the First Amendment. *Akins,* 420 F.3d at 1304. In contrast, the government's interest in preventing this type of speech is low. As the Eleventh Circuit held in *Akins,* speech of this kind "bring [s] the alleged wrongful practices to light and lead[s] to more efficient provision of public services." *Id.* Thus, the court finds that Plaintiffs' interests as citizens in making the complaints outweigh the interests of the government in preventing this type of speech.

c. Causation

The third prong of the public employee First Amendment retaliation test requires Plaintiffs to

"This is the one who had us all before the State Dental Board [regarding] Dr. Mike West." When asked for the basis of her emails to Linton, Ferrell testified during her deposition that in addition to timekeeping issues, Camp "was an independent operator." Further corroborating a retaliatory motive is Camp's testimony that Ferrell told him that he was terminated from PHS for "failure to follow policies and procedures and *not following [the] chain of command*." (Camp Dep. I 212.) This evidence creates a genuine issue of material fact that Camp's protected speech served as the impetus for Ferrell's recommendation not to hire him.

The ADOC defendants claim that Ferrell's email did not *cause* Camp not to be hired. Specifically, the ADOC defendants claim that Ferrell did not have the authority to make final hiring decisions, and that Linton was aware that only Naglich (or the warden) had this authority. (*See* Naglich Dep. 152-53 (Ex. L to CMS Summ. J. Br.).) However, after receiving Ferrell's emails, Linton requested that Ray "not continue [to] pursue Dr. Camp." Moreover, after receiving Ferrell's email, Linton sent an email to West stating that CMS would not be hiring Camp, and thanked him for the "heads up." This evidence is sufficient to establish a genuine issue of material fact that Ferrell's email, and thus Camp's speech, was a "substantial or motivating factor" behind the decision not to hire Camp. Therefore, the ADOC defendants' motion for summary judgment on Camp's retaliation claim against Ferrell is due to be denied on this basis.

Martindale has not provided sufficient evidence to meet her burden under the third prong of the public employee test with respect to her retaliation claim against Ferrell. Ferrell's emails to Linton do not mention Martindale by name. Plaintiffs contend that the ADOC defendants treated Camp and Martindale "as one," and, therefore, that "the retaliatory motives detailed in the emails above regarding Dr. Camp apply equally to Ms. Martindale." (Pls.' Resp. 13.) However, even if the court finds a genuine issue of material fact as to the existence of a retaliatory motive, causation is still absent: Martindale must show that the protected speech was a motivating factor in the *decision* not to hire her; however, there is no evidence beyond the relationships of the parties that Ferrell played a part in this decision. Martindale alleges that her offer of employment was "rescinded" after Linton spoke with Naglich—not Ferrell—about Martindale's alleged time issues while working at PHS.

Accordingly, the ADOC defendants' motion for summary judgment on Martindale's § 1983 claim against Ferrell is due to be granted.

ii. Naglich

Naglich responded to Linton's inquiry about Camp several days after Ferrell, stating that it was "[n]ot in our best interest" to hire Camp. At the time she made this recommendation, Naglich had never personally worked with or supervised Camp and had no personal knowledge of any complaints filed

against him. She was, however, aware that Camp had complained about the lack of proper supplies and the mistreatment of prisoners, and she had been shown Camp's 2003 letter to the ADOC Commissioner. Naglich claims that she had information regarding Camp's alleged "time and attendance issues," and that this served as her motivation for the email recommending that CMS not hire Camp. However, as Plaintiffs contend, the undisputed evidence shows that the ADOC did not object to the hiring of medical personnel with more suspect backgrounds. In fact, according to Linton, as of the time of his deposition on October 17, 2008, the ADOC had not declined *any* applications other than that of Camp. (Linton Dep. II 41 (Ex. M to Pls.' Summ. J. Br.).) The ADOC, and Naglich in particular, did not object to the hiring of another doctor (CMS Answer ¶ 77 (Doc. # 41)) whose medical licence had been revoked by the Virginia Board of Medicine. (Va. Bd. of Medicine Order (Ex. W to Pls.' Summ. J. Br.).) This particular doctor had a long history of "unethical and unprofessional conduct," including, among other things, improperly prescribing narcotics, maintaining inappropriate sexual relationships with patients, unlawfully self-medicating, and failing to maintain adequate records documenting medical treatment. (Va. Bd. of Medicine Order.) Thus, while time and attendance issues may have been a factor in Naglich's decision, a reasonable jury could find that this was mere pretext for retaliation, and that Camp's complaints served as a "substantial or motivating factor" for Naglich's email, and, thus, for the final decision not

to hire Camp.[7] The ADOC defendants' motion for summary judgment on Camp's retaliation claim against Naglich is therefore due to be denied on this basis.

The court finds that Martindale has likewise provided sufficient evidence to meet her burden under the third prong of the public employee test with respect to her retaliation claim against Naglich. Although the above-referenced emails from Naglich do not mention Martindale by name, the evidence suggests that Naglich's statements about Martindale caused the adverse employment action. Linton testified that Martindale "was offered the position with CMS" and that the offer was rescinded based on Linton's conversation with Naglich. (Linton Dep. II 106-07 (Ex. M to Pls.' Summ. J. Br.).) By her own admission, Naglich did not have to "okay" decisions to hire dental assistants. Thus, by bringing up Martindale, "*sua sponte*" in a conversation about *Camp*, Naglich demonstrated her retaliatory motives against Martindale. For these reasons, the ADOC defendants' motion for summary judgment on Martindale's retaliation claim against Naglich is due to be denied.

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[7]Plaintiffs claim that Naglich merely "ratified" the decision not to hire Camp. The ADOC defendants assert that she was the one who actually rejected the application. The court finds that she played a significant role in the decision not to hire Camp. Although Linton had already instructed Ray "not to pursue" Camp, Linton asserts that the *final* decision regarding Camp's employment was not made until after he heard from Naglich.

iii. Allen

Plaintiffs do not claim that Allen had any input in the decision not to hire Camp or Martindale; rather, Plaintiffs contend that Allen failed to investigate claims of retaliation and that he is liable as a supervisor. Camp testified in his affidavit that he contacted Allen to report his concerns that the hiring decision was in retaliation for his complaints against West.[8] Allen notified Naglich of Camp's

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[8]The ADOC defendants move to strike this paragraph (paragraph 25) from Camp's affidavit under the "sham affidavit" rule. (Doc. # 88.) A "sham affidavit" is one that flatly contradicts previous deposition testimony. *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir.1986). "An affidavit may only be disregarded as a sham 'when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact ... [and that party attempts] thereafter [to] create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.' " *Id.* at 954 (quoting *Van T. Junkins & Assocs. v. U.S. Indus.*, 736 F.2d 656, 657 (11th Cir.1984)).

> Here, Camp's affidavit does not "flatly contradict" his deposition testimony. Camp testified in his deposition that he "explained to [Allen] .... that [he] was concerned because [he] had learned that Laura Ferrell was working for AODC [sic] and that it may be a continuation or some form of retaliation given the personalities from [his] past-past experience." (Camp Dep. 67-68.) When asked whether he used the word "retaliation," Camp responded that he could not remember the exact word he used in his conversation with Allen. (Camp Dep. 68.) Camp

allegations, and Naglich responded by stating that she would have the site reviewed and look into any grievances or complaints.

Plaintiffs cite *Lewis v. Smith* to support their contention that Allen is liable as a supervisor. 855 F.2d 736 (11th Cir.1988). According to *Lewis*, "[s]upervisory liability under section 1983 may be shown by either the supervisor's personal participation in the acts that comprise the constitutional violation or the existence of a causal connection linking the supervisor's actions with the violation." *Id.* at 738. Plaintiffs do not present evidence showing that Allen personally participated in the decision not to hire Camp or Martindale; nor

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later asserted in his affidavit that he contacted Allen to report his concerns that the hiring decision was in retaliation for his complaints against West. (Camp Aff. I ¶ 25.) That Camp could not remember whether he used the exact word "retaliation" during his deposition does not foreclose the possibility that he used other words that conveyed the same meaning. "A definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." *Tippens*, 805 F.2d at 953. "Variations in a witness's testimony and any failure of memory throughout the course of discovery create an issue of credibility" and should be resolved by a trier of fact. *Id.* at 954. For these reasons, the ADOC defendants' motion to strike paragraph 25 of Camp's affidavit is unpersuasive.

do they present evidence of a "causal connection linking" Allen's actions with the hiring decisions. The final decision not to hire Camp was made *before* Camp contacted Allen with his concerns, and Martindale presents no evidence that she ever contacted Allen or that Allen was personally involved in the decision not to hire her. Thus, Plaintiffs have failed to meet their burden on the issue of causation with respect to their retaliation claims against Allen. For these reasons, the ADOC defendants' motion for summary judgment on Camp's and Martindale's retaliation claims against Allen is due to be granted.

3. Clearly Established Constitutional Right[9]

Having addressed the first part of the *Saucier* test-whether there was a constitutional violation-the final issue is whether the law was "clearly established" at the time of the alleged constitutional violations. 533 U.S. at 199, 121 S.Ct. 2151. There can be no serious dispute that the law prohibiting state officials from retaliating against employees who engage in protected speech is "clearly established." *See Walker v. Schwalbe*, 112 F.3d 1127, 1133 (11th

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[9]Because the following motions are due to be granted: (1) CMS's motion for summary judgment on both plaintiffs' § 1983 claims, (2) the ADOC defendants' motion for summary judgment on Martindale's § 1983 claims against Ferrell and Allen, and (3) the ADOC defendants' motion for summary judgment on Camp's § 1983 claim against Allen, the issue of whether the law was clearly established is only addressed with respect to Camp's § 1983 claims against Ferrell and Naglich and Martindale's § 1983 claim against Naglich.

Cir.1997) (citing *Pickering*, 391 U.S. 563, 88 S.Ct. 1731 and *Bryson v. City of Waycross*, 888 F.2d 1562, 1566 (11th Cir.1989) for the proposition that "in 1991, clearly established law informed reasonable government officials that [the plaintiff] could not be punished for his First Amendment speech").

4. Eleventh Amendment Immunity

The ADOC defendants make the additional argument that they are entitled to immunity under the Eleventh Amendment for all claims asserted against them in their official capacities. However, "the Eleventh Amendment does not prohibit a plaintiff from suing state officials in their official capacities for prospective injunctive relief and costs associated with that relief." *Stevens v. Gay*, 864 F.2d 113, 115 (11th Cir.1989). Therefore, the ADOC defendants' Eleventh Amendment immunity argument fails as to the claims for injunctive relief.

C. State-Law Claims

1. Tortious Interference with Business and Employment Relations

The ADOC defendants move for summary judgment on Camp and Martindale's second cause of action: Tortious interference with Plaintiffs' business and employment relations with CMS. To state a claim for tortious interference, a plaintiff must establish the following elements: "1) the existence of a contract or business relation; 2) the defendant's

knowledge of the contract or business relation; 3) intentional interference by the defendant with the contract or business relation; and 4) damage to the plaintiff as a result of the defendant's interference." *Pegram v. Hebding,* 667 So.2d 696, 701 (Ala.1995). The plaintiff must also demonstrate that the defendant was a "third party" or "stranger" to the contract with which he or she allegedly interfered. *Parsons v. Aaron,* 849 So.2d 932, 946 (Ala.2002) (internal citations omitted).

Here, the ADOC defendants contend that they were not "strangers" to the alleged contractual relationship, and, thus, cannot be held liable for any interference with said relationship. According to Plaintiffs, CMS's position directly undermines the ADOC defendants' argument. CMS has taken the position that its relationship with the ADOC defendants "is arms-length and strictly that of an independent contractor." (*See* Pls.' Resp. 26 (Doc. # 91) (citing CMS Summ. J. Br. 45-54).) However, Plaintiffs' tortious interference claim falls short in one important respect: The CMS-ADOC contract gives the ADOC express authority to reject any candidate for employment. (*See* ADOC-CMS contract (stating that "[t]he ADOC reserves the right to reject any CMS personnel.... Any such rejections shall not be unreasonably exercised by the ADOC").) Thus, as agents of the ADOC, the ADOC defendants were not "strangers" to Plaintiffs' employment relationship with CMS-Plaintiffs' employment had to be approved by both CMS *and* the ADOC. In expressing their views on individual job applicants, the ADOC

defendants simply acted pursuant to their contractual relationship with CMS. For these reasons, Plaintiffs' tortious interference claim cannot stand, and the ADOC defendants' motion for summary judgment is due to be granted on this basis.

2. Fraud/Promissory Fraud

In Plaintiffs' third cause of action, Martindale asserts a claim of fraud against CMS. (Am. Compl.) Specifically, Plaintiffs allege that CMS falsely represented that Martindale was hired, and later rescinded the offer of employment (Am. Comp. ¶¶ 60-63, 108; *see also* Martindale Aff. I ¶ 13 (Ex. B to Pls.' Summ. J. Br.) ("I applied for the part-time dental position with CMS on or about October 19, 2007. That same day I interviewed with Debra Hunt Vaughn at Limestone. The interview went well and Ms. Vaughn offered me the part-time dental assistant job on the spot.").) CMS contends that Martindale's claim is actually one for *promissory* fraud, arguing that any alleged promise by CMS was to begin work "within a week." (CMS Summ. J. Br. 55 (Doc. # 71).)

The Alabama Supreme Court distinguished the elements of fraud from the elements of promissory fraud in *Padgett v. Hughes:*

> In Plaintiffs' third cause of action, Martindale asserts a claim of fraud against CMS. (Am. Compl.) Specifically, Plaintiffs allege that CMS falsely represented that Martindale was hired,

> and later rescinded the offer of employment (Am. Comp. ¶¶ 60-63, 108; *see also* Martindale Aff. I ¶ 13 (Ex. B to Pls.' Summ. J. Br.) ("I applied for the part-time dental position with CMS on or about October 19, 2007. That same day I interviewed with Debra Hunt Vaughn at Limestone. The interview went well and Ms. Vaughn offered me the part-time dental assistant job on the spot.").) CMS contends that Martindale's claim is actually one for *promissory* fraud, arguing that any alleged promise by CMS was to begin work "within a week." (CMS Summ. J. Br. 55 (Doc. # 71).)

The Alabama Supreme Court distinguished the elements of fraud from the elements of promissory fraud in *Padgett v. Hughes*:

> The elements of fraud are (1) a false representation (2) of a material existing fact (3) reasonably relied upon by the plaintiff (4) who suffered damage as a proximate consequence of the misrepresentation. To prevail on a promissory fraud claim such as that at issue here, that is, one based upon a promise to act or not to act in the future, two additional elements must be satisfied: (5) proof that at the time of the misrepresentation, the defendant

> had the intention not to perform the act promised, and (6) proof that the defendant had an intent to deceive.

535 So.2d 140, 142 (Ala.1988).[10] Thus, the elements of Martindale's claim depend on whether Vaughn, the Health Services Administrator for CMS who interviewed Martindale, actually hired Martindale when she came in for the interview, or whether she merely promised to hire Martindale in the future.

The alleged false representation occurred during Martindale's interview with CMS on October 19, 2007. According to Martindale, Vaughn informed her "that she was hired" that same day. Vaughn testified that she did not in fact offer Martindale the job at that point, contending that she could not have offered Martindale the job because she was not "the ultimate decisionmaker." (Vaughn Dep. 15-16, 48, 112.) Further, Vaughn maintains that she could not offer the job "for sure" because she did not know the start date at the time of the interview. However, when asked during her deposition how she first met Martindale, Vaughn testified to the following: "[Martindale] came in for an interview [with

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[10]In its motion for summary judgment, CMS proceeds on the assumption that the claim is one for promissory fraud. In doing so, CMS devotes the entirety of its argument to the last two factors of a promissory fraud claim: intent not to perform and intent to deceive. Notably, CMS does not dispute the third and fourth elements of Plaintiffs' fraud claim.

NaphCare], and *I hired her as a dental assistant.*" (Vaughn Dep. 23.) From this testimony, a reasonable jury could infer that Vaughn had the authority to hire Martindale to work for NaphCare, and, thus, that she had similar authority to hire Martindale to work for PHS. The court is not in a position to make credibility determinations. Thus, genuine issues of material fact exist as to whether Vaughn offered Martindale the job on October 19, 2007, and both factual scenarios (supporting claims for fraud and promissory fraud) are addressed below.

On the assumption that Vaughn did in fact hire Martindale on October 19, 2007, and that the claim is one for fraud, the question remains whether the alleged offer of employment was a *false* representation. Other than the fact that Martindale was not retained to work for CMS, Plaintiffs offer no evidence that Vaughn's initial offer of employment was false. Further undermining the alleged falsity of Vaughn's representations is Vaughn's testimony that she previously hired Martindale to work at NaphCare, showing that such an offer, if made, would not be a false representation. Moreover, Plaintiffs allege that the decision not to retain Martindale was not made until Linton spoke to Naglich-*after* Martindale's interview with Vaughn. The Amended Complaint specifically states that "Defendant Naglich requested that Mr. Linton rescind CMS's offer to Ms. Martindale," and that "Mr. Linton complied with Defendant Naglich's request and informed Ms. [Vaughn] that Ms. Martindale's offer needed to be rescinded." (Am. Compl. ¶¶ 60, 62.)

The allegations of recision tend to disprove Plaintiffs' fraud claim. If, as Plaintiff's contend in their Amended Complaint, the offer of employment was valid, and that CMS and/or the ADOC *rescinded* the offer after it was made, the cause of action would be one for breach of contract, not fraud. Thus, Plaintiffs's claim for fraud cannot withstand summary judgment.

If, on the other hand, the jury finds that Vaughn did not in fact hire Martindale on October 19, 2007, and that the representation was a promise to hire in the future, the court must consider the whether Vaughn had the requisite intent to deceive Martindale when she made the alleged representation. The court finds that Plaintiffs have provided insufficient evidence to meet this element of a promissory fraud claim. "The failure to perform, alone, is not evidence of intent not to perform at the time the promise was made. If it were, a mere breach of contract would be tantamount to fraud." *Purcell Co., Inc. v. Spriggs Enterprises, Inc.*, 431 So.2d 515, 519 (Ala.1983). For the foregoing reasons, CMS's motion for summary judgment on Martindale's fraud/promissory fraud claim is due to be granted.

3. Slander Per Se

Plaintiffs' fourth cause of action alleges slander per se against Naglich. The alleged defamatory statements concern Naglich's communications to Linton about Camp and Martindale's time and attendance issues while

employed with PHS. Specifically, Plaintiffs claim that Naglich defamed Plaintiffs when she told Linton that they had engaged in fraudulent timekeeping. The ADOC defendants move for summary judgement, contending: (1) that the alleged defamatory statements were not "published"; (2) that Naglich's communications were made pursuant to a qualified privilege[11]; and (3) that the defense of truth applies.

A defendant is entitled to the affirmative defense of qualified privilege if she can demonstrate that the communication was "prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest." *Ex parte Blue Cross & Blue Shield of Ala.*, 773 So.2d 475, 478-79 (Ala.2000). The alleged defamatory statements at issue here are ones in which both parties to the communication (the ADOC and CMS) had an interest. In other words, both the ADOC and CMS had an interest in hiring qualified personnel to work in the Alabama prisons. Moreover, Naglich, "who is responsible for the administration of medical services to all Alabama prisoners" (Am. Compl. ¶ 68), had a professional obligation to inform CMS of concerns regarding any job applicants. Naglich is therefore entitled to the defense of qualified privilege.

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[11] *Ex parte Blue Cross & Blue Shield of Alabama* clarified that the term "qualified privilege" should be used to refer to the affirmative defense that previously had been termed "conditionally privileged." 773 So.2d 475 (Ala.2000).

However, the defense of qualified privilege only defeats a claim of "innocent or mistaken defamation." *Ex parte Blue Cross & Blue Shield of Ala.*, 773 So.2d at 479. "A plaintiff cannot prevail against an established defense of qualified privilege unless he has pleaded and proved defamation committed with actual malice." *Id.* Actual malice is established with evidence of "previous ill-will, hostility, threats, rivalry, other actions, former libels or slander, and the like ... or by the violence of the defendant's language, the mode and extent of the publication, and the like." *Butler v. Town of Argo*, 871 So.2d 1, 27 (Ala.2003) (internal quotations omitted).

Plaintiffs contend that Naglich's statements were made in bad faith, rising to the level of "actual malice." Specifically, Plaintiffs claim that Naglich had no personal knowledge of Plaintiffs' time records when she spoke to Linton and "that there was no way anyone could know if Dr. Camp's time cards were inaccurate." (Pls.' Resp. 24 (Doc. # 91).) To support this proposition, Plaintiffs cite Naglich's deposition testimony, in which she states that the basis for her statements was a conversation she had with PHS's Chief Operating Officer Dr. Hartman ("Hartman"). According to Naglich, when she inquired as to why Camp had been terminated from PHS, Hartman told her that it had to do with a "failure to comply with the required hours, and fraudulent reporting of hours." He also mentioned similar problems with dental assistants during this conversation. Plaintiffs contend that Naglich's lack of personal

knowledge-*i.e.*, the fact that she did not personally witness the alleged time and attendance issues-demonstrates her animus toward Camp and Martindale. Plaintiffs further contend that Naglich brought up Martindale's name "*sua sponte*" during a conversation with Linton "for the sole purpose of slandering her and preventing her from working at Limestone." (Pls.' Resp. 25.) The court finds that this evidence is insufficient to create a genuine issue of actual malice.

The fact that Naglich received the information regarding Plaintiffs' alleged time and attendance issues second-hand does not demonstrate ill will. This inquiry is separate from the one discussed in connection with Plaintiffs' First Amendment retaliation claim. While there was evidence that Camp's speech played a "substantial or motivating role" in the decision not to hire him, there is no evidence that Naglich acted with actual malice-*i.e.*, with reckless disregard for the truth or falsity of the statements uttered-when she reiterated what she heard from Hartman. In other words, the alleged time and attendance issues may have been simultaneously true *and* pretext for retaliation. Accordingly, the ADOC defendants' motion for summary judgment on Plaintiffs' slander claim against Naglich is due to be granted.

4. Tort of Outrage

In their fifth cause of action, Camp and Martindale claim that CMS and the ADOC

defendants committed the tort of outrage. According to the Alabama Supreme Court, "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress." *Am. Rd. Serv. Co. v. Inmon*, 394 So.2d 361, 365 (Ala.1980). "Extreme and outrageous conduct" refers to "conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." *Nabors v. St. Paul Ins. Co.*, 489 So.2d 573, 574 (Ala.1986). Plaintiffs fail to present evidence sufficient to support a claim for the tort of outrage.

The bulk of Plaintiffs' arguments concerns the harm caused to third parties. For example, Plaintiffs' complaint refers to inhumane treatment of prisoners, understaffing, cost to taxpayers, the qualifications of medical personnel hired, and the fact that CMS and the ADOC permitted West to continue to provide dental services to Alabama prisoners. (Am. Compl. ¶ 120). While certainly alarming, these allegations are irrelevant to Plaintiffs' claim of outrage. Defendants' decision not to hire Plaintiffs does not rise to the level of "extreme and outrageous" conduct. *See Newton v. Town of Columbia*, 695 So.2d 1213, 1218 (Ala.Civ.App.1997) ("[W]hile the conduct alleged ... may amount to an assault, or to a violation of [the plaintiff's] constitutional rights, it does not follow that the same conduct necessarily constitutes extreme and outrageous conduct sufficient to support

an action for intentional infliction of emotional distress."). Failing to hire someone in retaliation for protected speech does not "go beyond all possible bounds of decency" such that it should "be regarded as atrocious and utterly intolerable in a civilized society." *Nabors,* 489 So.2d at 574. If it did, than any claim for First Amendment retaliation could be converted into a tort claim for outrage. The effect this decision had on prisoners or taxpayers does not change the nature of the actions as related to Plaintiffs. Thus, CMS's motion for summary judgment and the ADOC defendants' motion for summary judgment on Plaintiffs' outrage claims are due to be granted.

5. Negligent and/or Wanton Supervision and Retention

Plaintiffs allege a claim against CMS for negligent and/or wanton supervision and retention of Linton. Plaintiffs' claim rests on CMS's failure to act in the face of Linton's alleged participation in the retaliation and violation of company policies. Plaintiffs have failed to meet their burden to overcome summary judgment on this claim.

A claim for negligent supervision is, at bottom, a negligence claim. Therefore, Plaintiffs must establish the elements of duty, breach, causation, and injury. The only two elements at issue here are breach and causation.

To satisfy the breach element of a claim for negligent supervision, a plaintiff must present evidence that (1) the employee acted incompetently and (2) the employer had notice of the incompetency but failed to act. *Thompson v. Havard*, 285 Ala. 718, 235 So.2d 853, 858 (1970). At a minimum, employee incompetence requires a showing of habitual negligence-negligence alone "is not synonymous with incompetency." *Pritchett v. ICN Med. Alliance, Inc.*, 938 So.2d 933, 941 (Ala.2006). To satisfy the notice requirement of the breach element, the plaintiff must show that a specific act of incompetency was "brought to the knowledge of" the employer, or that the incompetency was "of such nature, character, and frequency" that an employer exercising due care would be on notice. *Thompson*, 235 So.2d at 858.

Linton's conduct serves as the basis for Plaintiffs' claim against CMS. Plaintiffs attempt to demonstrate Linton's incompetency with three pieces of evidence: (1) the email chain with West, allegedly showing a "pattern of sharing confidential information" in violation of CMS's policies; (2) the email to CMS's Dental Recruiter instructing her not to pursue Camp; and (3) the email to CMS's Vice-President of Operations, J.M. Courtney, in which Linton wrote "Camp has a history and is not allowed back by the ADOC. This is a good thing as he is bad news administratively. He thinks nothing of going around us to the commissioner and has recently done so. Smart commissioner, foolish him." The court addresses each piece of evidence in turn.

Linton's communications with West concerning potential hires do not rise to the level of incompetency. The emails to which Plaintiffs refer consist predominately of West's recommendations to Linton. Plaintiffs do not argue that receiving emails of this nature constitutes incompetency. Rather, they claim that Linton violated company policy by disclosing confidential information in an email to West in which Linton informed West that CMS would not be hiring Camp. Even if this did constitute a violation of CMS's policy, Camp sent the email *after* the decision not to hire Camp was made, and, therefore, it could not have put CMS on notice of any wrongdoing.

Similarly, the email instructing Vaughn not to pursue Camp does not constitute incompetency. The ADOC had authority to deny job applicants; Ferrell indicated that the ADOC was exercising this authority with respect to Camp; and Linton simply followed through with these instructions.

Plaintiffs claim that the last email in which Linton references Camp's history of "going around the commissioner" put CMS on notice of the retaliatory conduct. Viewing the evidence in the light most favorable to Plaintiffs, a jury could find that this email demonstrates a retaliatory motive, *i.e.*, that Camp's complaints served as a basis for the decision not to hire him. However, this email was sent after the fact, and Plaintiffs fail to show how it put CMS on notice of employee incompetency before the alleged injury, *i.e.*, the failure to hire Camp and

Martindale. In other words, Plaintiffs cannot show how this email *caused* their injury. Plaintiffs claim that CMS failed to take remedial measures upon receiving this email, but there is no evidence that CMS could have done so. The ADOC exercised its discretion not to hire Plaintiffs, and Plaintiffs do not provide any evidence that CMS could have overridden this decision after the fact. For these reasons, Plaintiffs' negligent supervision claim against CMS fails and CMS's motion for summary judgment on this basis is due to be granted.

6. Wanton Supervision and Retention Against Naglich and Allen

Plaintiffs' complaint alleges that Naglich and Allen "wantonly supervised" their subordinates by "permitting, or failing to prevent" the alleged retaliatory hiring decision. (Am. Compl.) Plaintiffs point to no evidence demonstrating that either Allen's or Naglich's alleged wanton supervision caused the adverse employment action. Rather, Plaintiffs devote the bulk of their argument to Allen's and Naglich's alleged failure to investigate the hiring decision *after* the denial of Camp's application. Specifically, Camp alleges that Allen and Naglich did not investigate the reasons why his application was rejected, and that if they had, they could have remedied the alleged retaliatory conduct.

Even if Plaintiffs could sustain an action for wanton supervision for failure to remedy the injury after it occurred, Plaintiffs have not met their burden

of showing that Allen's and Naglich's conduct was "wanton" in this case. The Alabama Supreme Court has defined "wantonness" as "the conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result." *Pritchett,* 938 So.2d at 941.

Plaintiffs do not present evidence that Allen or Naglich failed to act while "being conscious that ... injury [would] likely or probably result." *Pritchett,* 938 So.2d at 941. The undisputed evidence establishes that Camp contacted Allen with "concerns" after the hiring decision was made; Allen communicated Camp's concern to Naglich; and Naglich conducted an investigation. Specifically, Naglich testified that Allen informed her that "Dr. Camp had ... a great deal of allegations concerning the dental care at Limestone [and] spoke of inmates being mistreated and infection." (Naglich Dep. 193-94 (Ex. D to Pls.' Summ. J. Br.).) According to Naglich, she told Allen that she would "have the site reviewed and look at ... any grievances or complaints." (Naglich Dep. 194 (Ex. D to Pls.' Summ. J. Br.).) Naglich further testified that she conducted an investigation and reported back to Allen that "there weren't an abnormal amount of grievances; there was no backlog at that point in time; CMS did not have a full-time dentist, but was providing dental hours." (Naglich Dep. 194 (Ex. D to Pls.' Summ. J. Br.).) She also stated that "if there's an accusation, we look at it." (Naglich Dep. 195 (Ex. D to Pls.' Summ. J. Br.).) Allen and Naglich acted upon Camp's concerns. That

they did not investigate as thoroughly as Camp would like does not constitute "wanton" conduct.

For these reasons, the ADOC defendants' motion for summary judgment on Plaintiffs' wanton supervision claims against Allen and Naglich is due to be granted.

7. Civil Conspiracy

Plaintiffs allege civil conspiracy against CMS, Naglich, and Ferrell. Civil conspiracy requires "a combination of two or more persons to accomplish an unlawful end or to accomplish a lawful end by unlawful means." *Keith v. Witt Auto Sales, Inc.,* 578 So.2d 1269, 1274 (Ala.1991). "The gist of the action is not the conspiracy alleged, but the wrong committed." *Sadie v. Martin,* 468 So.2d 162, 165 (Ala.1985). Thus, if the underlying wrong provides no cause of action, then neither does the conspiracy. A violation of § 1983 can serve as the underlying wrong in a civil conspiracy claim. *See Boone v. Mingus,* 697 F.Supp. 1577, 1582 (S.D.Ala.1988).

Because CMS cannot be held vicariously liable for the acts of Linton under of § 1983, there is no "actionable wrong" in which CMS participated with Naglich and Ferrell. Furthermore, even if CMS could be held liable for Linton's acts in concert with Naglich and Ferrell, the evidence establishes that CMS did not have the authority to ignore the ADOC's hiring decisions under the ADOC-CMS contract. Representatives of the ADOC made the decision not

to retain Camp and Martindale; if they conspired to "accomplish an unlawful end," they did so among themselves. Thus, CMS's motion for summary judgment on this claim is due to be granted.

Plaintiffs have, on the other hand, presented sufficient evidence to survive summary judgment on their civil conspiracy claim against Naglich and Ferrell. According to the Alabama Supreme Court, "The existence of the conspiracy must often be inferentially and circumstantially derived from the character of the acts done, the relation of the parties, and other facts and circumstances suggestive of concerted action." *O'Dell v. State of Alabama ex rel. John Patterson,* 270 Ala. 236, 117 So.2d 164, 168 (1960). Here, Plaintiffs present evidence that both Ferrell and Naglich worked for the ADOC at the time of the alleged retaliatory action and that both Ferrell and Naglich were aware of Camp's and Martindale's protected speech at the time their applications with CMS were denied. Although Ferrell did not expressly instruct Linton not to pursue Martindale, "[i]t is not an essential element of the claim that a particular conspirator commit an overt act in furtherance of the conspiracy." *Huckleberry v. M.C. Dixon Lumber Co.,* 503 So.2d 1209, 1210-11 (Ala.1987). A reasonable jury could infer from the "character of the acts done [and] the relation of the parties" that both Naglich and Ferrell conspired to deny Plaintiffs a job opportunity in retaliation for Plaintiffs' prior speech. Thus, the court finds that the ADOC defendants'

motion for summary judgment on this claim is due to be denied.[12]

V. CONCLUSION

Accordingly, it is ORDERED that:

(1) Plaintiffs' motion for summary judgment (Doc. # 69) is DENIED.

(2) CMS's motion for summary judgment (Doc. # 70) is GRANTED.

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[12]The ADOC defendants claim that they are entitled to state agent immunity under Alabama law. The Alabama Constitution "prohibits actions against state officers in their official capacities when those actions are, in effect, actions against the State." *Haley v. Barbour County,* 885 So.2d 783, 788 (Ala.2004) (internal citations omitted). However, the ADOC defendants can be divested of state agent immunity upon a showing that they acted "willfully, maliciously, fraudulently, in bad faith, beyond [their] authority, or under a mistaken interpretation of the law." *Giambrone v. Douglas,* 874 So.2d 1046, 1052 (Ala.2003). To the extent Ferrell and Naglich conspired to retaliate against Martindale and/or Camp because of their protected speech, a reasonable jury could find that they did so willfully or in bad faith. In other words, Plaintiffs have presented sufficient evidence-including the relationships of the parties and the communications between the parties, as discussed in connection with Plaintiffs § 1983 and conspiracy claims-to create a genuine issue of material fact that Ferrell and Naglich acted willfully or in bad faith when they allegedly conspired to retaliate against Plaintiffs. Thus, state agent immunity does not defeat Plaintiffs' civil conspiracy claim at the summary judgment stage.

(3) The ADOC defendants' motion for summary judgment (Doc. # 73) is GRANTED as to both Plaintiffs' § 1983 First Amendment retaliation claim against Allen, GRANTED as to Martindale's § 1983 First Amendment retaliation claim against Ferrell, DENIED as to Martindale's § 1983 First Amendment retaliation claim against Naglich, DENIED as to Camp's § 1983 First Amendment retaliation claim against Ferrell and Naglich, GRANTED as to Plaintiffs' tortious interference with business and employment relations claim against all the ADOC defendants, GRANTED as to both Plaintiffs' slander per se claim against Naglich, GRANTED as to both Plaintiffs' tort of outrage claim against all the ADOC defendants, GRANTED as to both Plaintiffs' wanton supervision claim against Allen and Naglich, and DENIED as to both Plaintiffs' civil conspiracy claim against Ferrell and Naglich.

Therefore, surviving in this action are the following claims:

(1) Camp's § 1983 First Amendment retaliation claim against Ferrell and Naglich;

(2) Martindale's § 1983 First Amendment retaliation claim against Naglich; and

(3) Both Plaintiffs' civil conspiracy claim against Ferrell and Naglich.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-15770-DD

LARRY CAMP, DR.,
SABRINA MARTINDALE,

Plaintiffs-Appellees,

versus

CORRECTIONAL MEDICAL SERVICES, INC., et al.,
RUTH NAGLICH,
in her official and individual capacities as Associate Commissioner,
LAURA FERRELL,
in her official and individual capacities as Medical Systems Administrator,

Defendants-Appellants.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 28, 2010
JOHN LEY
CLERK

On Appeal from the United States District Court
for the Middle District of Alabama

ORDER:

( ) The motion of Appellants, Ruth Naglich and Laura Ferrell, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellants, Ruth Naglich and Laura Ferrell, for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including March 14, 2011, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

ORD-45

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-15770-DD

LARRY CAMP, DR.,
SABRINA MARTINDALE,

Plaintiffs-Appellees,

versus

CORRECTIONAL MEDICAL SERVICES, INC., et al.,
RUTH NAGLICH,
in her official and individual capacities as Associate Commissioner,
LAURA FERRELL,
in her official and individual capacities as Medical Systems Administrator,

Defendants-Appellants.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 14, 2010
JOHN LEY
CLERK

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION (S) FOR REHEARING AND
PETITION (S) FOR REHEARING EN BANC

Before: TJOFLAT, CARNES and REAVLEY*, Circuit Judges.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition (s) for Rehearing En Banc are DENIED

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

*Honorable Thomas M. Reavley, United States Circuit Judge for the Fifth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Dr. Larry Camp and Sabrina Martindale,	)	RECEIVED 2008 MAR 27 P 12:17 DEBRA P. HACKETT, CLK U.S. DISTRICT COURT MIDDLE DISTRICT ALA
Plaintiffs,	)	
v.	)	
Correctional Medical Services, Inc., Richard F. Allen, individually and in his official capacity as Commissioner of Alabama Department of Corrections, Ruth Naglich, in her official and individual capacities, and Laura Ferrell, in her official and individual capacities,	)	
Defendants.	)	

Case No. 2:08cv227-csc

Jury Trial Demanded

COMPLAINT

Plaintiffs Dr. Larry Camp and Sabrina Martindale hereby file this Complaint seeking declaratory, injunctive, and other relief against

Correctional Medical Services, Inc., Alabama Department of Corrections Commissioner Richard F. Allen, in his official and individual capacities, Associate Commissioner Ruth Naglich, in her official and individual capacities, and Medical Systems Administrator Laura Ferrell, in her official and individual capacities. In support thereof, Plaintiffs state the following:

THE PARTIES

1. Plaintiff Dr. Larry Camp is over the age of 19 years and is a citizen of the United States and the State of Alabama. Dr. Camp is a retired United States Army Colonel and is a dentist licensed to practice in the State of Alabama.

2. Plaintiff Sabrina Martindale is over the age of 19 years and is a citizen of the United States and the State of Alabama. Ms. Martindale is a dental assistant.

3. Defendant Correctional Medical Services, Inc. ("CMS") is a corporation registered to do business in the State of Alabama. Alabama Secretary of State records reflect that CMS maintains a business address at 60 Commerce Street, Montgomery, Alabama 36103 and may be served through its registered agent, National Registered Agents, Inc., which is located at 150 South Perry Street, Montgomery, Alabama 36104.

4. Defendant Richard F. Allen, who is over the age of 19 years, is the Commissioner for the Alabama Department of Corrections. Allen is a citizen of Alabama who works and/or resides within the jurisdiction of this Court. Allen may be served at 301 S. Ripley Street, Montgomery, Alabama 36130.

5. Defendant Ruth Naglich, who is over the age of 19 years, is the Associate Commissioner of Health Services for the Alabama Department of Corrections. Naglich is a citizen of Alabama who works and/or resides within the jurisdiction of this Court. Naglich may be served at 301 S. Ripley Street, Montgomery, Alabama 36130.

6. Defendant Laura Ferrell, who is over the age of 19 years, is the Medical Systems Administrator and special projects manager for the Alabama Department of Corrections. Ferrell is a citizen of Alabama who works and/or resides within the jurisdiction of this Court. Ferrell may be served at 301 S. Ripley Street, Montgomery, Alabama 36130.

JURISDICTION AND VENUE

7. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367. This lawsuit arises under the Constitution and laws of the United States, particularly the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1983 and 1988. This Court has supplemental and pendant jurisdiction over Plaintiffs' state law claims.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391. A substantial part of the events giving rise to the claims set forth in this Complaint occurred in this District and Division.

FACTS

9. The Alabama Department of Corrections ("ADOC") is responsible for confining, managing, and providing rehabilitative programs for convicted felons in a safe, secure and humane environment, utilizing professionals who are committed to public safety and to the positive re-entry of offenders into society.

10. The ADOC has delegated its responsibilities relating to the mental and dental care of Alabama prisoners to third-party contractors, including CMS.

11. Pursuant to a ADOC contract effective November 1, 2007, CMS is responsible for providing medical and dental services to prisoners assigned to Alabama State prisons. The services provided by CMS on behalf of the ADOC, pursuant to its three-year, 228 million dollar contract with the ADOC, are funded by Alabama taxpayers. As a result of the contract, CMS have a close and symbiotic relationship. CMS is also performing a State public function in that it provides medical and dental care on behalf of the State to incarcerated inmates who are wards of the State.

12. Prison Health Services ("PHS") previously provided medical and dental services to prisoners

assigned to Alabama State prisons pursuant to a contract entered into between PHS and the ADOC. This contract was effective between November 1, 2003 and October 31, 2007.

13. Pursuant to the ADOC's contract with PHS, Dr. Camp and Ms. Martindale worked at Limestone Correctional Facility ("Limestone"), an Alabama prison located in Harvest, Alabama.

14. Dr. Camp worked as a staff dentist at Limestone and Ms. Martindale worked as a dental assistant at Limestone. During their employment at Limestone, Dr. Camp and Ms. Martindale provided exemplary dental services to the prisoner-patients.

15. During their employment at Limestone, Dr. Camp and Ms. Martindale witnessed their supervisor, Dr. Mike West, PHS's Director of Dental Services for all prisons within the Alabama Corrections system, engage in improper conduct. This conduct included the: delivery of unnecessarily brutal and painful dentistry on the prisoner-patients, reuse of unsterilized equipment on prisoner-patients, and arbitrary denial of basic dental equipment and supplies.

16. Dr. Camp reported Dr. West's misconduct to PHS's Regional Medical Director in December 2003. That same week, Dr. Camp filed a complaint against Dr. West with the Board of Dental Examiners of Alabama ("Dental Board"). PHS discharged Dr. Camp less than one month after he complained to

PHS and the Dental Board about Dr. West's improper conduct and mistreatment of prisoners.

17. Ms. Martindale filed a complaint with the Dental Board in January 2004 and testified on behalf of the Dental Board against Dr. West. Ms. Martindale was discharged by PHS shortly after testifying against Dr. West.

18. The Dental Board ultimately sanctioned Dr. West on May 5, 2005 for his misconduct at Limestone after finding that he failed "to comply with the current recommendations of the Centers for Disease Control and Prevention's Recommended Infection-Control Practices for Dentistry"

19. Laura Ferrell was PHS's Regional Vice-President during Dr. Camp's and Ms. Martindale's employment at Limestone. In her capacity as Regional Vice-President, Ferrell supervised Dr. West as well as Dr. Camp and Ms. Martindale.

20. Ferrell had direct knowledge of the complaints brought by Dr. Camp and Ms. Martindale against Dr. West. In fact, she testified on Dr. West's behalf before the Dental Board.

21. Ferrell recommended, authorized, and/or otherwise approved of the decision to discharge Dr. Camp and Ms. Martindale from PHS after their participation in the Board's investigation of Dr. West.

22. In or around September 2007, the ADOC announced that it would not renew PHS's service contract and that it would be entering into a three-year medical services contract with CMS valued at over $223 million.

23. Alabama's Legislative Contract Review Committee initially delayed implementation of the contract after it received reports that another contractor had bid between $6-9 million less than CMS and learned that several ADOC officials who had reviewed the contracts had previously worked for CMS. Alabama's Legislative Contract Review Committee does not have the power to cancel contracts and, despite their concerns, the contract became effective November 1, 2007.

24. In or around late September 2007, Dr. Camp submitted an application packet to the Dental Recruiter for CMS for the staff dentist position at Limestone.

25. Dr. Camp interviewed with Dr. King for the staff dentist position at Limestone on or about October 12, 2007.

26. Several days later, Dr. Camp called Dr. King to inquire into the status of his application and was told that the ADOC had to approve everyone before a contract could be offered to him by CMS. Dr. King indicated that this was a mere formality and that he had approved his hire.

27. Approximately one week after his interview at Limestone, Dr. Camp was informed by CMS that the ADOC had denied his application for employment at Limestone. No reason was given for the decision and CMS indicated that the decision was beyond its control.

28. Over the next few months, Dr. Camp repeatedly attempted to contact Naglich, who is responsible for the administration of medical services to all Alabama prisoners, to learn the reason(s) why his employment application was denied. Naglich failed to return any of his phone calls.

29. Dr. Camp contacted Allen on or about January 3, 2008. Dr. Camp explained the situation to Allen and stated that he had repeatedly attempted to speak with Naglich to no avail. Allen assured Dr. Camp that he would have Naglich contact him regarding the employment decision. Despite Allen's assurances, Naglich failed to do so.

30. Ms. Martindale applied for employment at Limestone and was interviewed at Limestone in October 2007. At the end of the interview, Debbie Hunt, Health Services Administrator for CMS, hired Ms. Martindale for the dental assistant position. Ms. Martindale was informed that her hourly rate of pay would be $15 per hour and that she would start once Dr. Camp started treating prisoner-patients at Limestone. As a result of these representations, Ms. Martindale ceased looking for employment and prepared to start work at Limestone.

31. Approximately one week after being hired, Ms. Martindale contacted Limestone to find out when she and Dr. Camp would be starting. Ms. Martindale was told that neither she or Dr. Camp were going to be allowed to work at Limestone and that CMS employees were told not to ask any questions.

32. Ms. Martindale was also told that one or more employees from CMS had complained to ADOC officials that they would not work with her and/or Dr. Camp because they had complained about Dr. West and/or were "whistleblowers" and/or "troublemakers".

33. CMS employees were aware that Dr. Camp and Ms. Martindale had previously complained about Dr. West's mistreatment of prisoners, however, when informed by ADOC that Dr. Camp and Ms. Martindale would not be hired and were told not to ask questions, CMS failed to investigate.

First Cause of Action:

28 U.S.C. § 1983 - Violation of Constitutional Rights

34. Plaintiffs hereby allege and incorporate by reference paragraphs 1-33 as if set forth fully herein.

35. Defendants, which have a close and symbiotic relationship, have, through the aforesaid acts, unlawfully retaliated against Plaintiffs for engaging in speech on matters of public concern, including the

mistreatment of prisoners, in violation of the First and Fourteenth Amendments.

36. Defendants have acted in violation of clearly established law and in a manner that no competent and responsible agent of the State would believe was lawful.

37. Dr. Camp's and Ms. Martindale's speech played a substantial role in Defendants' decision to deny them employment at Limestone.

38. Upon information and belief, Defendants' acts were intentional, malicious, reckless, and willful.

39. Plaintiffs have suffered damages, including a loss of property, as a direct and proximate result of Defendants' malicious, intentional, and wrongful conduct.

40. Plaintiffs are entitled to recover compensatory and punitive damages, in an amount to be determined by the trier of fact, as a result of the aforementioned unlawful conduct.

41. Pursuant to 42 U.S.C. § 1988, Plaintiffs are also entitled to recover from Defendants the costs of this action, including reasonable attorneys fees.

Second Cause of Action:

Tortious Interference with Business and Employment Relations

42. Plaintiffs hereby allege and incorporate by reference paragraphs 1-33 as if set forth fully herein.

43. As evidenced by the allegations set forth above, Defendants Allen, Ferrell, Naglich, in their individual capacities, willfully, tortiously and maliciously interfered with the business relationships of Plaintiffs, including, but not limited to, their prospective employment relationships and employment relationships with CMS.

44. Defendants Allen, Ferrell, and Naglich had knowledge of the relationships between Plaintiffs and CMS and intentionally, willfully, and maliciously interfered in said relationship without cause or justification.

45. Defendants Allen, Ferrell, and Naglich acts caused Plaintiffs to lose employment with CMS at Limestone and resulted in financial losses to Plaintiffs.

46. As a direct and proximate result of said action by Defendants Allen, Ferrell, and Naglich, Plaintiffs have suffered damages in an amount to be proven at trial.

Third Cause of Action:

Fraud Against CMS

47. Plaintiffs hereby allege and incorporate by reference paragraphs 1-33 as if set forth fully herein.

48. Defendant CMS made false representations to Ms. Martindale that it knew were false when made, or recklessly made representations without regard to their truth or falsity, regarding their decision to hire her at Limestone as a dental assistant at an hourly rate of $15 per hour following her interview at Limestone.

49. Defendant CMS's misrepresentations involved one or more material facts.

50. Ms. Martindale reasonably relied on the misrepresentations by CMS to her detriment.

51. Ms. Martindale was damaged as a result of her reliance on the fraudulent representations of Defendant CMS.

Fourth Cause of Action:

Civil Conspiracy

52. Plaintiffs hereby allege and incorporate by reference paragraphs 1-33 as if set forth fully herein.

53. Defendant CMS and Defendants Allen, Ferrell, and/or Naglich agreed to and did conspire together to engage in tortious conduct against Plaintiffs and to violate the rights of Plaintiffs as a result of Plaintiffs' decisions to complain about Dr. West's inhumane treatment of prisoners assigned to Limestone.

54. Plaintiffs have suffered damages as a direct and proximate result of the conspiracy between and among Defendants in an amount to be determined by the trier of fact.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

a. That Plaintiffs be awarded compensatory damages, including front pay and back pay, and punitive damages from Defendant CMS;

b. That Plaintiffs be awarded compensatory damages, including front pay and back pay, and punitive damages from Defendants Allen, Ferrell, and Naglich, in their individual and/or official capacities;

c. That the Court declare that Defendants' failure to hire Plaintiffs violate Plaintiffs' rights under the First and Fourteenth Amendments of the Constitution of the United States of America;

d. That the Court enjoin Defendants from the continuation of such unlawful acts;

e. That Plaintiffs recover their attorney fees and costs incurred in bringing this action from Defendants; and

f. For all such other and further relief as is deemed just and proper by this Court.

Submitted this 27th day of March, 2008.

/s/ Lindsey Edlemann
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Counsel for Plaintiffs Dr. Camp and Ms. Martindale

PLAINTIFFS DEMAND A TRIAL BY A JURY OF THEIR PEERS

/s/ Lindsey Edelmann
Lindsey Edelmann

Counsel for Plaintiffs Dr. Camp and Ms. Martindale

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Dr. Larry Camp and Sabrina Martindale,	)	
Plaintiffs,	)	
v.	)	Case No. 2:08CV227-CSC
Correctional Medical Services, Inc., et al.,	)	Jury Demand Requested
Defendants.	)	

ANSWER OF DEFENDANTS ALLEN, NAGLICH, AND FERRELL

Come now the Defendants Richard F. Allen, Ruth Naglich and Laura Ferrell, in their official and individual capacities, and files this their Answer stating as follows:

1. In response to the allegations asserted in Paragraph 1 of Plaintiffs' Complaint, these Defendants admit that Dr. Camp is over the age of 19 years and is a citizen of the United States and the State of Alabama. These Defendants are without adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 1 of

Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

2. In response to the allegations asserted in Paragraph 2 of Plaintiffs' Complaint, these Defendants admit that Martindale is over the age of 19 years and is a citizen of the United States and the State of Alabama. These Defendants are without adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 2 of Plaintiffs' Complaint and, therefore denies them and demands strict proof thereof.

3. These Defendants admit the allegations asserted in Paragraph 3 of Plaintiffs' Complaint.

4. These Defendants admit the allegations asserted in Paragraph 4 of the Plaintiffs' Complaint.

5. These Defendants admit the allegations asserted in Paragraph 5 of the Plaintiffs' Complaint.

6. These Defendants admit that Laura Ferrell is over the age of 19, employed by the Alabama Department of Corrections and may be served at 301 S. Ripley Street, Montgomery, Alabama 36130. These Defendants deny the remainder of paragraph 6, as alleged, and demand strict proof thereof.

7. In response to the allegations asserted in Paragraph 7 of Plaintiffs' Complaint, these

Defendants deny these allegations and demands strict proof thereof.

8. In response to the allegations asserted in Paragraph 8 of Plaintiffs' Complaint these Defendants deny these allegations and demands strict proof thereof.

9. These Defendants admit the Alabama Department of Corrections ("ADOC") is responsible for confining, managing convicted felons in a safe, secure and humane environment. To the extent that the allegations asserted in Paragraph 9 implies that the ADOC has a statutory duty created by law to provide "rehabilitative programs...utilizing professionals who are committed to public safety and to the positive re-entry of offenders into society" the Defendant are without information to reach any conclusion regarding the truth or falsity of this allegations and therefore, denies and demands strict proof thereof.

10. These Defendants admit the allegations asserted in Paragraph 10 of the Plaintiffs' Complaint.

11. In response to the allegations asserted in Paragraph 11 of Plaintiffs' Complaint, the Defendants admit that CMS began providing medical and dental services on November 1, 2007, for inmates incarcerated in ADOC facilities with the State of Alabama pursuant to its contract with the ADOC. These Defendants admit the contract to provide medical and dental care are funded by Alabama

taxpayers but denies the remaining allegations in Paragraph 11 of Plaintiffs' Complaint, and demands strict proof thereof.

12. These Defendants admit the allegations asserted in Paragraph 12 of the Plaintiffs' Complaint.

13. These Defendants admit the allegations asserted in Paragraph 13 of the Plaintiffs' Complaint.

14. In response to the allegations asserted in Paragraph 14 of Plaintiffs' Complaint, these Defendants admit that Dr. Camp worked as a staff dentist at Limestone and Martindale worked as a dental assistant at Limestone; otherwise, these Defendants are without adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 14 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

15. In response to the allegations asserted in Paragraph 15 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

16. In response to the allegations asserted in Paragraph 16 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

17. In response to the allegations asserted in Paragraph 17 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

18. In response to the allegations asserted in Paragraph 18 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

19. These Defendants admit that Laura Ferrell was PHS' Regional Vice-President during Dr. Camp's and Ms. Martindale's employment at Limestone. These Defendants deny that in her capacity as Regional Vice-President, Ferrell "supervised Dr. West as well as Dr. Camp and Ms. Martindale" and demands strict proof thereof.

20. In response to the allegations asserted in Paragraph 20 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

21. In response to the allegations asserted in Paragraph 21 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

22. In response to the allegations asserted in Paragraph 22 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

23. In response to the allegations asserted in Paragraph 23 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

24. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 24 of Plaintiffs' Complaint, these Defendant lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 24 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

25. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 25 of Plaintiffs' Complaint, these Defendants lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 25 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

26. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 26 of Plaintiffs' Complaint, these Defendants lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 26 of Plaintiffs' Complaint and,

therefore, denies them and demands strict proof thereof.

27. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 27 of Plaintiffs' Complaint, these Defendants lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 27 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

28. In response to the allegations asserted in Paragraph 28 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

29. Defendant Allen admits that Dr. Camp contacted him; otherwise, but these Defendants deny the remaining allegations in Paragraph 29 of Plaintiffs' Complaint, and demands strict proof thereof.

30. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 30 of Plaintiffs' Complaint, these Defendant lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 30 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

31. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 31 of Plaintiffs' Complaint, these Defendant lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 31 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

32. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 32 of Plaintiffs' Complaint, these Defendants lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 32 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

33. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 33 of Plaintiffs' Complaint, these Defendant lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 33 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

34. In response to the allegations asserted in Paragraph 34 of Plaintiffs' Complaint these Defendants restate and incorporate each and every

response to the allegations asserted in paragraphs 1 through 34 of Plaintiffs' Complaint, as if set forth fully herein.

35. In response to the allegations asserted in Paragraph 35 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

36. In response to the allegations asserted in Paragraph 36 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

37. In response to the allegations asserted in Paragraph 37 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

38. In response to the allegations asserted in Paragraph 38 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

39. In response to the allegations asserted in Paragraph 39 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

40. In response to the allegations asserted in Paragraph 40 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

41. In response to the allegations asserted in Paragraph 41 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

42. In response to the allegations asserted in paragraph 42 of Plaintiffs' Complaint, these Defendants restate and incorporate each and every response to the allegations asserted in paragraphs 1 through 41 of Plaintiffs' Complaint, as if set forth fully herein.

43. In response to the allegations asserted in Paragraph 43 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

44. In response to the allegations asserted in Paragraph 44 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

45. In response to the allegations asserted in Paragraph 45 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

46. In response to the allegations asserted in Paragraph 45 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

47. In response to the allegations asserted in paragraph 47 of Plaintiffs' Complaint, these Defendants restate and incorporate each and every response to the allegations asserted in paragraphs 1 through 46 of Plaintiffs' Complaint, as if set forth fully herein.

48. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 48 of Plaintiffs' Complaint, these Defendants lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 48 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

49. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 49 of Plaintiffs' Complaint, these Defendants lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 49 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

50. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 50 of Plaintiffs' Complaint, these Defendants lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted

in Paragraph 50 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

51. To the extent that Plaintiffs intend to assert any claims arising out of the allegations asserted in Paragraph 51 of Plaintiffs' Complaint, these Defendants lack adequate knowledge and/or information to reach any conclusion regarding the truth or falsity of the remaining allegations asserted in Paragraph 51 of Plaintiffs' Complaint and, therefore, denies them and demands strict proof thereof.

52. In response to the allegations asserted in paragraph 52 of Plaintiffs' Complaint, these Defendants restate and incorporate each and every response to the allegations asserted in paragraphs 1 through 51 of Plaintiffs' Complaint, as if set forth fully herein.

53. In response to the allegations asserted in Paragraph 53 of the Plaintiffs' Complaint, these Defendants deny these allegations and demands strict proof thereof.

54. In response to the allegations asserted in Paragraph 54 of the Plaintiffs' Complaint, these Defendants deny these allegations and demand strict proof thereof.

AFFIRMATIVE AND OTHER DEFENSES

First Defense

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

Second Defense

Plaintiffs' claims are barred by the doctrine of justification.

Third Defense

Plaintiffs' claims are barred by the doctrine of qualified immunity.

Fourth Defense

Plaintiffs' claims are barred by the doctrine of sovereign immunity.

Fifth Defense

Plaintiffs' claims are barred, in whole or in part, because of their failure to mitigate damages.

Sixth Defense

These Defendants aver that the wrongs and damages alleged by Plaintiffs were caused solely by the acts and/or omissions of person and/or entities for whom or which these Defendants are not responsible.

Seventh Defense

Plaintiffs' claims are barred because these Defendants did not breach any duty these persons allegedly owed to Plaintiffs.

Eighth Defense

Plaintiffs' claims are barred because there is no casual relationship, legal or proximate, between these Defendants' actions or failures to act and the Plaintiffs' alleged injuries and damages.

Ninth Defense

Plaintiffs' claims are barred because of the lack of damages suffered due to any of the alleged wrongs asserted against these Defendant.

Tenth Defense

Plaintiffs' claims are barred by the employment-at-will doctrine.

Eleventh Defense

These Defendants, nor CMS or any CMS employee, officer, agent or representative, made any false representations to Martindale.

Twelfth Defense

Martindale did not actually rely, nor did she reasonably rely, on any purported representation

allegedly made by CMS or any CMS employee, officer, agent or representative of these Defendants.

Thirteenth Defense

Any alleged reliance by Martindale on any alleged representations made by CMS was not reasonable.

Fourteenth Defense

Plaintiffs' civil conspiracy count contained in the Complaint fails to allege an underlying tort in which all defendants engaged to support such claim. Willis v. Parker , 814 So.2d8 57 (Ala. 2001).

Fifteenth Defense

The Defendants are not guilty of the underlying torts alleged by Plaintiffs; therefore, Plaintiffs' count of civil conspiracy fails as a matter of law. Willis v. Parker, 814 So.2d 857 (Ala. 2001).

Sixteenth Defense

Plaintiffs are not entitled to any judgment against the Defendants.

Seventeenth Defense

Plaintiffs are not entitled to recover any damages, interest, costs, attorneys' fees or other relief whatsoever from the Defendants.

Eighteenth Defense

Any and all action of the Defendants with regard to Plaintiff were lawful, appropriate and/or justified.

Nineteenth Defense

Plaintiffs' § 1983 claim is barred because any exercise by Plaintiffs of any alleged protected conduct and/or speech was not the basis for, or substantial factor in, any decision not to hire Plaintiffs and any decision would have been the same in the absence of any alleged exercise of protected conduct and/or speech.

Twentieth Defense

Plaintiffs' Complaint is barred, wholly or in part, by agreements and/or documents executed by Plaintiffs.

Twenty-First Defense

To the extent Plaintiffs are claiming punitive damages against Defendants, the Defendants state as follows:

The award of punitive damages as claimed by plaintiff violates Article I, § 10[1] and/or the Fourth, Fifth, Sixth, Eighth and/or Fourteenth Amendments of the United States Constitution and Article I, § 6, of the Alabama Constitution of 1901 on the following separate and several grounds:

a. The civil procedures pursuant to which punitive damages are awarded may wrongfully result in a punishment by a punitive damages award after the fact.

b. The civil procedures pursuant to which punitive damages are awarded may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing.

c. The civil procedures pursuant to which punitive damages are awarded fail to provide means for awarding separate judgments against alleged joint tortfeasors.

d. The civil procedures pursuant to which punitive damages are awarded fail to provide a limit on the amount of the award against the defendants.

e. The civil procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages.

f. The civil procedures pursuant to which punitive damages are awarded fail to provide specific standards for the award of punitive damages.

g. The civil procedures pursuant to which punitive damages are awarded permit the award of punitive damages upon satisfaction of a

standard of proof less than that applicable to the imposition of criminal sanctions.

h. The civil procedures pursuant to which punitive damages are awarded permit multiple awards of punitive damages for the same alleged act.

i. The civil procedures pursuant to which punitive damages are awarded fail to provide a clear and consistent appellate standard of review of an award of punitive damages.

j. The civil procedures pursuant to which punitive damages are awarded permit the admission of evidence relative to punitive damages in the same proceedings during which liability and compensatory damages are determined.

k. The standards of conduct upon which punitive damages are awarded are vague.

l. The civil procedures pursuant to which punitive damages are awarded would permit the imposition of excessive fines.

m. The civil procedures pursuant to which punitive damages are awarded permit the award of punitive damages upon satisfaction of a standard of proof which is not heightened in relation to the standard of proof for ordinary civil cases.

n. The civil procedures pursuant to which punitive damages are awarded permit the

imposition of arbitrary, capricious or oppressive penalties.

o. The civil procedures pursuant to which punitive damages are awarded fail to limit the discretion of the jury in the award of punitive damages.

Twenty-Second Defense

The Defendants expressly reserves the right to amen its anser to assert any other grounds for avoidance and/or affirmative defenses, the basis for which may become known during discovery or trial or at any other time during the pendency of this action.

Twenty-Third Defense

To the extent that any allegation or claim is grounded in state law, the Defendants are entitled to discretionary function immunity under the Alabama Constitution.

Twenty-Fourth Defense

To the extent that any allegation or claim is grounded in state law, the Plaintiff is barred from suit by Article I Section 14 of the Alabama Constitution.

Twenty-Fifth Defense

To the extent that any allegation or claim is grounded in state law, the Defendants are entitled to state agent immunity.

Twenty-Sixth Defense

Any claims against these Defendants in their official capacity are barred by the Eleventh Amendment to the United States Constitution.

JURY DEMAND

These Defendant demand a trial by struck jury as to all claims asserted in Plaintiffs' Complaint and any subsequent amendment thereto.

Respectfully submitted this the 21st day of April, 2008.

Respectfully submitted by,

/s/ Kim T. Thomas (THO115)
General Counsel
Deputy Attorney General
Attorney for Allen, Naglich, and Ferrell

Alabama Department
of Corrections
301 S. Ripley Street
Montgomery, AL 36104

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Dr. Larry Camp and Sabrina Martindale,	)	
Plaintiffs,	)	
v.	)	
Correctional Medical Services, Inc., Richard F. Allen, individually and in his official capacity as Commissioner of Alabama Department of Corrections, Ruth Naglich, in her official and individual capacities, and Laura Ferrell, in her official and individual capacities,	)	Case No. 2:08cv227-WKW-CSC
Defendants.	)	Jury Trial Demanded

AMENDED COMPLAINT

Plaintiffs Dr. Larry Camp and Sabrina Martindale hereby file this Amended Complaint seeking declaratory, injunctive, monetary and other

relief against Correctional Medical Services, Inc.; Richard F. Allen, individually and in his official capacity as Commissioner of the Alabama Department of Corrections ("ADOC"); Ruth Naglich, individually and in her official capacity as ADOC Associate Commissioner; and Laura Ferrell, individually and in her official capacity as ADOC Medical Systems Administrator. In support thereof, Plaintiffs state the following:

THE PARTIES

1. Plaintiff Dr. Larry Camp is over the age of 19 years and is a citizen of the United States and the State of Alabama. Dr. Camp is a retired United States Army Colonel with numerous military awards and commendations. He is also a dentist licensed to practice in the State of Alabama.

2. Plaintiff Sabrina Martindale is over the age of 19 years and is a citizen of the United States and the State of Alabama. Ms. Martindale is a dental assistant.

3. Defendant Correctional Medical Services, Inc. ("CMS") is a corporation registered to do business in the State of Alabama. Defendant CMS maintains a business address at 60 Commerce Street, Montgomery, Alabama 36103 and may be served with process through its registered agent, National Registered Agents, Inc., which is located at 150 South Perry Street, Montgomery, Alabama 36104.

4. Defendant Richard F. Allen, who is over the age of 19 years and is the Commissioner for the ADOC. Defendant Allen is a citizen of Alabama who works and/or resides within the Middle District of Alabama, Northern Division . Defendant Allen may be served with process and pleadings at 301 S. Ripley Street, Montgomery, Alabama 36130.

5. Defendant Ruth Naglich, who is over the age of 19 years, is the Associate Commissioner of Health Services for the ADOC. Prior to working for the ADOC, Defendant Naglich worked for the Defendant CMS and Prison Health Services, Inc. Defendant Naglich is a citizen of Alabama who works and/or resides within the Middle District of Alabama, Northern Division. Defendant Naglich may be served at 301 S. Ripley Street, Montgomery, Alabama 36130.

6. Defendant Laura Ferrell, is over the age of 19 years, and is the Medical Systems Administrator for the ADOC. Prior to working for the ADOC, Defendant Ferrell worked for Defendant CMS, Prison Health Services, Inc., and NaphCare, Inc. Defendant Ferrell is a citizen of Alabama who works and/or resides within the Middle District of Alabama, Northern Division. Defendant Ferrell may be served with process and pleadings at 301 S. Ripley Street, Montgomery, Alabama 36130.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367. This lawsuit arises under the Constitution and laws of the United States, particularly the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1983 and 1988. This Court has supplemental and pendant jurisdiction over Plaintiffs' state law claims.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391. A substantial part of the events giving rise to the claims set forth in this Amended Complaint occurred in this District and Division.

9. This court has personal jurisdiction over all the Defendants in this case because each Defendant resides, works, or maintains a registered agent within the Middle District of Alabama, Northern Division and because each Defendant has previously been served with a summons and complaint in this matter and have answered the same.

FACTS

10. The ADOC is responsible for confining, managing, and providing rehabilitative programs for convicted felons in a safe, secure and humane environment.

11. The ADOC has delegated its constitutional responsibilities relating to the medical and dental

care of Alabama prisoners to third-party contractors, including CMS.

12. Pursuant to a ADOC contract effective November 1, 2007, CMS is responsible for providing medical and dental services to prisoners assigned to Alabama State prisons. The services provided by CMS on behalf of the ADOC, pursuant to its three-year, 223 million dollar contract with the ADOC, are funded by Alabama taxpayers. As a result of the contract, CMS and ADOC have a close and symbiotic relationship. CMS is also performing a State public function in that it provides constitutionally-mandated medical and dental care on behalf of the State to incarcerated inmates.

13. Prison Health Services, Inc. ("PHS") previously provided medical and dental services to prisoners assigned to Alabama State prisons pursuant to a contract entered into between it and the ADOC. This contract was effective between November 3, 2003 and October 31, 2007. PHS's three-year contract with the ADOC was valued in excess of 142 million dollars.

14. Pursuant to its contract with the ADOC, NaphCare, Inc. ("NaphCare") provided medical and dental services to prisoners assigned to Alabama State prisons between January 1, 2002 and October 31, 2003.

Plaintiff's Employment With NaphCare and PHS

15. Pursuant to ADOC's contracts with NaphCare and PHS, Dr. Camp and Ms. Martindale worked at Limestone Correctional Facility ("Limestone"), an Alabama prison located in Harvest, Alabama. Dr. Camp also worked at St. Clair Correctional Facility during both contracts.

16. Dr. Camp worked as a dentist and Ms. Martindale worked as a dental assistant under both the NaphCare and PHS contracts. During their employment, Dr. Camp and Ms. Martindale provided exemplary dental services to the prisoner-patients in their care.

17. Dr. David Michael West was the director of Dental services for the state prisons within the Alabama corrections system under both the NaphCare and PHS contracts. Dr. West obtained this position of authority despite being previously convicted of two counts of fraudulently obtaining controlled drugs in Calhoun County, Alabama.

18. Dr. West had also been repeatedly sanctioned by the Board of Dental Examiners of Alabama at the time he was hired by NaphCare and PHS and approved by he ADOC.

19. While treating prisoners pursuant to these contracts, Plaintiffs witnessed Dr. West, their supervisor, engage in improper and unethical conduct. This conduct included the delivery of

unnecessarily brutal and painful dentistry on the prisoner-patients, the reuse of unsterilized equipment on prisoner-patients, and the arbitrary denial of basic dental equipment and supplies at Limestone. The use of unsterilized equipment is a serious matter of public concern as Limestone houses prisoners with and without HIV and other communicable diseases.

Plaintiffs Report Dr. West's Abusive Treatment of Prisoners to the Appropriate Authorities and are Terminated by PHS

20. On December 11, 2003, while employed with PHS, Dr. Camp reported Dr. West's misconduct to PHS's Regional Medical Director. Dr. Camp copied the ADOC's Commissioner on his report.

21. Defendant Ferrell, PHS's Regional Vice-President, who supervised Dr. West, Dr. Camp and Ms. Martindale during their employment with PHS, also received a copy of Dr. Camp's report.

22. Six days after notifying PHS and the ADOC about Dr. West's mistreatment of prisoners, Dr. Camp filed a complaint against Dr. West with the Board of Dental Examiners of Alabama ("Dental Board") on December 17, 2003. (A copy of Dr. Camp's complaint is attached as Exhibit A).

23. On January 2, 2004, while employed with PHS, Ms. Martindale filed a complaint with the Dental Board. (A copy of Ms. Martindale's complaint

is attached as exhibit B) In her complaint, Ms. Martindale alleged Dr. West was "brutal" when dealing with inmates and that he used unsterilized equipment (over her objection and despite the fact that sterilized equipment was available) during his treatment of 17 inmates on November 19, 2003.[1]

24. PHS discharged Dr. Camp less than one month after he complained to PHS, the ADOC, and the Dental Board about Dr. West's improper conduct and mistreatment of prisoners.

25. Defendant Ferrell recommended, authorized, and/or otherwise approved Dr. Camp's termination from PHS.

26. Ms. Martindale was discharged by PHS after testifying on behalf of the Dental Board against Dr. West. Defendant Ferrell recommended , authorized, and/or otherwise approved Ms. Martindale's termination from PHS.

27. Prior to her discharge, Ms. Martindale was suspended by Defendant Ferrell for failing to comply with her directive that Ms. Martindale turn over all incriminating evidence against Dr. West to her. More specifically, Defendant Ferrell suspended Ms. Martindale because she "failed to follow the

[1]The proposed Amended Complaint contained a typographical error on the November date. This error has been corrected to ensure clarity and accuracy.

reasonable request of a supervisor [Ferrell], is evasive when asked to give information, [and] makes accusations and has no facts to back them on...".

Defendant Ferrell Rewards Dr. West

28. While the Dental Board's investigation against Dr. West was pending, Defendant Ferrell gave Dr. West an outstanding performance review. Defendant Ferrell's review failed to mention the complaints filed against Dr. West by Dr. Camp and Ms. Martindale.

29. At or around the same time, Defendant Ferrell gave Dr. West a raise in compensation and continued to allow him to treat prisoner-patients within the State of Alabama.

Dr. West is Sanctioned By The Dental Board

30. Defendant Ferrell was well-aware of the complaints brought by Dr. Camp and Ms. Martindale against Dr. West. Indeed, she testified before the Dental Board on behalf of her long-time friend, Dr. West.

31. The Dental Board ultimately sanctioned Dr. West on May 5, 2005 for his misconduct at Limestone after finding that he failed "to comply with the current recommendations of the Centers for Disease Control and Prevention's Recommended Infection-Control Practices for Dentistry". Limestone has a considerable HIV population as well as inmates with Hepatitis C. Dr. West was using the same

instruments to treat all inmates and was not sterilizing the instruments. As a consequence, other inmates who were HIV positive may have been exposed to this deadly disease and other highly contagious diseases. The Dental Board Amended its Order on September 8, 2005 to include the following language: "It is the further Order of the Board that if the said David Michael West is found in the future, after notice and hearing, to be in violation of the Alabama Dental Practice Act, his license to practice dentistry in this State shall be permanently revoked." (A copy of the Dental Board's September 8, 2005 Order is attached as Exhibit C).

32. Defendant Ferrell did not terminate Dr. West as a result of the Dental Board's finding. Instead, Defendant Ferrell placed Dr. West on a paid leave of absence.

Defendant Ferrell Leaves PHS And Is Hired By ADOC

33. Defendant Ferrell resigned from PHS on or about August 25, 2006.

34. On or about that same day, Defendant Ferrell was appointed by Defendant Allen to the position of Medical Systems Administrator effective September 1, 2006. This was a new position and no other candidates were considered for this ADOC position.

35. Defendant Ferrell works out of the ADOC's office approximately one day per week and spends

the majority of time working from her home. Defendant Ferrell occasionally works at Fountain Correctional Facility. Defendant Ferrell's husband, Jerry Ferrell, is the warden of Fountain Correctional Facility.

36. Defendant Ferrell is required to work eight hour days. Ferrell, however, admits that she does not work these hours each day. Nevertheless, Defendant Ferrell routinely completes and ADOC time sheet and certifies that she works eight hours each day.

37. Falsification of ADOC records, including time-records, is an immediately terminable offense at the ADOC. ADOC is aware that she falsifies her timesheets. Defendant Ferrell, however, has not been disciplined or terminated by the ADOC.

CMS Secures a 223 Million Dollar Contract With the ADOC

38. In or around September 2007, the ADOC announced that it would not renew PHS's service contract and that it would be entering into a three-year medical and dental services contract with CMS valued at over 223 million dollars.

39. CMS retained two lobbyists to work on its behalf to secure its 223 million dollar contract with the ADOC. At least one of CMS's lobbyists attended and ADOC sponsored event in or around September

2008. Defendant Naglich attended this event as did a number of CMS employees.

40. Alabama's Legislative Contract Review Committee initially delayed implementation of the CMS contract after learning that CMS was awarded the contract despite that fact that at least one contractor had bid between 6 million and 9 million less than CMS.

41. The vast majority of the ADOC officials who reviewed the contract proposals and recommended CMS's proposal be accepted by the ADOC previously worked for CMS, including Defendant Naglich and Ferrell.

42. The contract between the ADOC and CMS requires that CMS employ 1.4 full-time equivalent dentists and 1.4 full-time equivalent dental assistants at Limestone. However, for the initial three months of the contract, the ADOC is required to pay CMS a rate of $70.30 per hour for the 1.4 full-time equivalent dentists at Limestone even if CMS fails to provide 1.4 full-time equivalent dentists at Limestone.

43. In other words, the ADOC is required to pay CMS over $47,000 for dental services at Limestone regardless of whether CMS employs or retains a dentist at Limestone during the initial three months of the contract or receives these services. Although the hourly rates differ, the same is true for all

unfilled positions during the initial three months of the contract.

Dr. Camp Applies To Work With CMS

44. In early October 2007, Dr. Camp submitted an application packet to CMS's Dental Recruiter, Christine Rey, for the staff dentist position at Limestone. CMS approved Dr. Camp's application and Ms. Ray arranged for Dr. Camp to interview with Dr. King at Limestone on or about October 12, 2007.

45. Dr. King is CMS's Director of Dental Services and supervises all dentists treating prisoners in the State of Alabama. Dr. King also treats prisoner-patients at Limestone and St. Clair Correctional Facility. Dr. King obtained this position of authority despite the fact that he had been previously sanctioned by the Dental Board for prescribing, administering, and dispensing controlled substances to an individual who was not under Dr. King's care. (A copy of the Dental Board's Order regarding Dr. King is attached as Exhibit D).

46. Dr. Camp interviewed with Dr. King on or about October 12, 2007. The interview went well and Dr. King commented that Dr. Camp's resume was quite impressive.

Ms. Martindale Applies To Work With CMS

47. Ms. Martindale applied for employment with CMS at Limestone and was interviewed at Limestone

on or about October 19, 2007. At the end of the interview, Debbie Hunt, CMS's Health Services Administrator, hired Ms. Martindale for the dental assistant position.

48. Ms. Martindale was informed by Ms. Hunt that her hourly rate of pay would be $15 per hour and that she would start once Dr. Camp started treating prisoner-patients at Limestone. As a result of these representations, Ms. Martindale ceased looking for employment and prepared to start work at Limestone.

CMS Fails To Hire Dr. Camp

49. Several days after his interview with Dr. King, Dr. Camp called Dr. King to inquire into the status of his application. Dr. Camp was told that the ADOC had to approve everyone before a contract could be offered to him by CMS. Dr. King indicated that this was a mere formality and that he had approved his hire.

50. On October 15, 2007, Ms. Ray emailed Larry Linton and stated that Dr. King wanted to make an offer to Dr. Camp. Mr. Linton is CMS's Regional Vice-President and is responsible for the administration of the contract between CMS and ADOC.

51. That same day, Mr. Linton also received an email from Dr. West. In this email, a former CMS employee who Mr. Linton had previously supervised, stated that received an email from Dr. King

"regarding a future hire at Limestone - Larry Camp. This is the guy who wrote everyone from the commissioner down to stir up trouble for PHS. I guarantee you he will not work an 8 hour day consistently. The Board believed his crap against me. No one else did! Good luck!?"

52. After receiving the emails of Ms. Ray and Dr. West, Mr. Linton replied to Ms. Ray and stated: "Please Hold off on this offer - there may be a history with him. I will check with ADOC".

53. Mr. Linton then forwarded Ms. Ray's October 15, 2007 email to Defendants Naglich and Ferrell, his former CMS co-workers, and stated: "I heard Dr. Camp, dentist, has a history in Alabama. He wants to work for us at Limestone - any guidance?"

54. Defendant Ferrell responded to Mr. Linton's email the next morning, October 16, 2007, and stated: "Absolutely not!" Defendant Naglich was copied on Defendant Ferrell's email to Mr. Linton.

55. Five minutes after sending the email to Mr. Linton regarding Dr. Camp, Defendant Ferrell sent a second email to Mr. Linton in which she stated: "This is the one who had us all before the State Dental Board r/t Dr. Mike West."

56. Mr. Linton promptly forwarded Defendant Ferrell's emails to Ms. Ray and stated: "Please do not pursue Dr. Camp". (A Copy of this email is attached as Exhibit E).

57. The next day, October 17, 2007, Mr. Linton emailed Dr. West and stated: "We will not be using [Dr. Camp's] services. Thanks, Mike for the heads up. Hope you are doing well." (A copy of this email is attached at Exhibit F).

58. Approximately one week after the decision had been made by Defendant Ferrell and CMS not to hire Dr. Camp, Defendant Naglich ratified the decision.

59. At the same time, Defendant Naglich told Mr. Linton that Dr. Camp had falsified his time during his previous employment with PHS. Of course, Defendant Naglich had never seen Dr. Camp's PHS time records and has no direct knowledge of his job responsibilities, duties, or work schedule at PHS.

CMS Rescinds Ms. Martindale's Employment Offer

60. At or around the time Defendant Naglich ratified the decision not to allow Dr. Camp to work at Limestone, Defendant Naglich learned of Ms. Martindale's hire at Limestone. Despite the fact that the ADOC does not participate in hiring decisions of dental assistants, Defendant Naglich requested that Mr. Linton rescind CMS's offer to Ms. Martindale.

61. During this conversation, Defendant Naglich told Mr. Linton that Ms. Martindale had falsified her time records during her employment with PHS. Defendant Naglich had never seen Ms. Martindale's PHS time records and has no direct knowledge of Ms.

Martindale's job responsibilities, duties, or work schedule at PHS.

62. Mr. Linton complied with Defendant Naglich's request and informed Ms. Hunt that Ms. Martindale's offer needed to be rescinded.

63. Ms. Hunt followed Mr. Linton's instructions and put a note on Martindale's application stating: "CMS can't hire per L. Linton".

Plaintiffs Attempt To Find Out Why They Are Prohibited From Working

64. Neither the ADOC nor CMS contacted Dr. Camp to tell him he would not be hired. Similarly, neither the ADOC nor CMS contacted Ms. Martindale to inform her that her employment offer had been rescinded.

65. Distressed about the lack of information, approximately one week after being hired, Ms. Martindale contacted Limestone to find out when she and Dr. Camp would be starting. Ms. Martindale was told by CMS that neither she or Dr. Camp were going to be allowed to work at Limestone and that CMS employees were told not to ask any questions.

66. Ms. Martindale was also told that one or more employees from CMS had complained to ADOC officials that they would not work with her and/or Dr. Camp because they had complained about Dr. West and/or were "whistleblowers" and/or "troublemakers".

67. Dr. Camp also called CMS to find out the status of his application. Dr. Camp was finally informed by Ms. Hunt in December 2007 that the ADOC had denied his application to work at Limestone. No other reason was given for the decision. When Dr. camp asked who at the ADOC would deny his application, he was informed that "Laura Ferrell now works for the ADOC".

68. Upon learning this information, Dr. Camp repeatedly attempted to contact Defendant Naglich, who is responsible for the administration of medical services to all Alabama prisoners, to learn the reason(s) why his employment application was denied by the ADOC. Defendant Naglich failed to return any of Dr. Camp's phone calls.

69. Around the same time, Dr. Camp also reiterated his interest in working at Limestone to Ms. Ray. Ms. Ray indicated as much in her notes when she commented on December 19, 2007 that "Dr. Camp is still very interested in full-time and would like to speak to someone regarding the reasons they do not want him back." These same notes reflect that Limestone was still without a full-time dentist in December 2007.[2]

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[2]Incredibly, Dr. Camp received a solicitation from CMS on March 28, 2008 to work for CMS. Moreover, on or about May 4, 2008, CMS advertised for full and part-time dental positions in the *Huntsville Times* newspaper

70. On December 28, 2007, Dr. King sent an email to Mr. Linton and Ms. Ray that stated: "I received word today that Dr. Camp is upset that he was not selected and intends to make an appointment with Warden Michem [the warden at Limestone] to discuss why he was not selected. I am informed that this is in keeping with his past behaviors that caused ADOC to decline his as a candidate this time around."

71. Rather than investigate this email or contact Dr. Camp to discuss the reason(s) he was not hired, Mr. Linton forwarded Dr. King's email to his former coworkers, Defendants Ferrell and Naglich. Despite the knowledge of Defendants, they failed to act. (A copy of this email is attached as Exhibit G; Defendants' email was marked "Confidential")

72. Distraught and frustrated with the lack of information, Dr. camp contacted Defendant Allen at the ADOC on or about January 3, 2008. Dr. Camp explained the situation to Defendant Allen and stated that he had repeatedly attempted to speak with Defendant Naglich to no avail. Defendant Allen assured Dr. Camp that he would have Defendant Naglich contact him regarding the employment decision. Despite Defendant Allen's assurances, Defendant Naglich failed to do so.

73. Defendant Allen did, however, request that Defendant Naglich investigate the allegations made by Dr. Camp. Defendant Naglich subsequently reported to Defendant Allen that the allegations

made by Dr. Camp were meritless. Based on Defendant Naglich's report, Defendant Allen ratified the decision not to hire Dr. Camp.

Consequences Of CMS's Failure To Hire Dr. Camp and Ms. Martindale

74. Dr. Camp and Ms. Martindale were the only two qualified individuals who applied to work at Limestone who were denied the opportunity to do so by the ADOC in 2007.

75. Dr. Camp and Ms. Martindale were also the only two qualified individuals who applied to work at Limestone starting on November 1, 2007[3] who were not hired by CMS.

76. Although unwilling to hire Dr. Camp and Ms. Martindale, CMS and/or the ADOC have not hesitated to hire and/or approve dentists who have been sanctioned by the Dental Board to work on Alabama's prisoners. Indeed, CMS has had informal discussions about allowing Dr. West to return to work at one or more Alabama prisons on an "as needed basis" or to perform denture work, despite the fact that he is a convicted felon who has been sanctioned no less than three separate times by the Dental Board.

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[3]The proposed Amended Complaint contained a typographical error on the November date. This error has been corrected to ensure clarity and accuracy.

77. The ADOC has also approved Dr. McGinn, who had his medical licence revoked in Virginia, to oversee psychiatric care of prisoners at the Alabama's point-of-entry prison, Kilby Correctional Facility. Dr. McGinn's license was revoked after the Virginia Board of Medicine concluded, among other things, that he prescribed thousands of doses of narcotics without accepted therapeutic purpose contrary to sound medical judgement, maintained inappropriate sexual relationships with numerous patients, gave alcohol to at least one patient in his care, consumed medication prescribed for his patients, and unlawfully self-medicated himself with his office stock of drugs. (A copy of the Virginia Board of Medicine's Order is attached at Exhibit H).

78. CMS employees, including Dr. King, Ms. Hunt, Ms. Ray and Mr. Linton, were aware that Dr. Camp and Ms. Martindale had previously complained about Dr. West's mistreatment of prisoners. However, when informed by the ADOC that Dr. Camp and Ms. Martindale would not be hired and were told not to ask questions, CMS failed to investigate or pursue the matter further.

79. The failure to hire Dr. Camp and Ms. Martindale left Limestone without a full-time dentist and dental assistant to treat Limestone's prisoner-patients.

80. The delay in treatment and services caused prisoners to suffer needlessly. For example, Sammy Caldwell, a prisoner at Limestone, filled out a sick

call request form on November 20, 2007 in which he stated "I would like to get my tooth pulled by a dentist as soon as possible."

81. A week later, on November 27, 2007, CMS responded to Mr. Caldwell's sick call request and stated that "No dentist on staff at this time to provide treatment. Go to medical sick call if needed. No appt made." (A copy of CMS's response to Mr. Caldwell's November 20, 2007 request is attached as Exhibit I).

82. On November 29, 2007, Mr. Caldwell filed an inmate grievance which stated: "On November 20, 2007, I filled out a sick call request to see a dentist so he/she could pull my teeth. Nevertheless on November 27, 2007, and A. Davis informed me that 'No Dentist on staff at this time to provide treatment- no appt. made.' My teeth are still hurting and causing me severe pain in which I cannot eat or sleep. PLEASE have someone pull my teeth as soon as possible. There is a delay in health care because no dentist is on staff." (A Copy of this grievance is attached as Exhibit J).

83. Four days later, on December 3, 2007, CMS responded to Mr. Caldwell's grievance as follows: "Your sick call slip for Dental has been collected and put on a Dental list. We are anticipating a Dentist being here soon and you will be seen then." (A Copy of CMS's response to Mr. Caldwell's grievance is attached as Exhibit K).

84. Mr. Caldwell did not see a dentist at Limestone until December 13, 2007. Even then he was not treated by a staff dentist, but instead, he was seen by Dr. King, who Mr. Caldwell alleged left part of his tooth in his mouth, threatened bodily harm to him, and left him in severe pain. (A copy of this grievance appeal is attached at Exhibit L).

85. The failure to hire Dr. Camp and Ms. Martindale also allowed CMS to receive over $31,000 of Alabama taxpayers money for services not rendered by CMS or received by the ADOC or the prisoners in its care.

Relationship Between the Defendants

86. Defendant Naglich speaks to CMS employees, including Mr. Linton, approximately ten to twelve times a day regarding the administration of the CMS contract.

87. Defendant Naglich makes "joint" hiring decisions with CMS regarding who will be performing medical and dental services to Alabama prisoners. Defendant Ferrell provides input into CMS's hiring decisions.

88. Defendants Naglich and Ferrell (and other ADOC employees) participate in monthly meetings with CMS to discuss contract administration.

89. While employed with CMS, Defendant Naglich supervised Mr. Linton who in turn supervised Dr. West and Defendant Ferrell.

90. Mr. Linton considers Defendants Ferrell and Naglich to be his friends. The ADOC is a client of CMS that CMS wants to keep happy. If the ADOC becomes dissatisfied with CMS, it may upon 120 days notice, cancel the contract with CMS for any or no reason.

First Cause of Action:

28 U.S.C. § 1983 - Violation of Constitutional Rights

91. Plaintiffs hereby allege and incorporate by reference paragraphs 1-90 as if set forth fully herein.

92. CMS is a state actor and/or agent of the ADOC.

93. Defendants, who have a close and symbiotic relationship, have, through the aforesaid acts, unlawfully retaliated against Plaintiffs for engaging in speech on matters of public concern, including the abuse and mistreatment of Alabama prisoners, in violation of the First and Fourteenth Amendments.

94. Defendants have acted in violation of clearly established law and in a manner that no competent and responsible agent of the State would believe was lawful.

95. Dr. Camp's and Ms. Martindale's speech played a substantial and motivating role in Defendants' decision to deny them employment at Limestone.

96. Defendants' acts were intentional, malicious, reckless, and willful.

97. The unlawful actions of Defendants Ferrell, Naglich and Allen are not protected by qualified immunity.

98. Plaintiffs have suffered damages, including a loss of property, as a direct and proximate result of Defendants' malicious, intentional, unconstitutional and wrongful conduct.

99. Plaintiffs are entitled to recover compensatory and punitive damages, in an amount to be determined by the trier of fact, as a result of the aforementioned unlawful conduct.

100. Pursuant to 42 U.S.C. § 1988, Plaintiffs are also entitled to recover from Defendants the costs of this action, including reasonable attorneys fees.

Second Cause of Action:

Tortious Interference with Business and Employment Relations

101. Plaintiffs hereby allege and incorporate by reference paragraphs 1-90 as if set forth fully herein.

102. Defendants Allen, Ferrell, and Naglich, in their individual capacities, willfully, tortiously and maliciously interfered with the business relationships of Plaintiffs, including, but not limited to, their prospective employment relationships and employment relationships with CMS.

103. Defendants Allen, Ferrell, and Naglich had knowledge of the relationships between Plaintiffs and CMS and intentionally, willfully, and maliciously interfered in said relationship without cause or justification.

104. Defendants Allen, Ferrell, and Naglich are not entitled to the protection of qualified immunity as their bad-faith actions were willful, malicious, and/or beyond their authority.

105. Defendants Allen, Ferrell, and Naglich acts caused Plaintiffs to lose employment with CMS at Limestone and resulted in financial losses to Plaintiffs.

106. As a direct and proximate result of said action by Defendants Allen, Ferrell, and Naglich, Plaintiffs have suffered compensatory damages in an amount to be proven at trial and are entitled to punitive damages.

Third Cause of Action:

Fraud Against CMS

107. Plaintiffs hereby allege and incorporate by reference paragraphs 1-90 as if set forth fully herein.

108. Defendant CMS made false representations to Ms. Martindale that it knew were false when made, or recklessly made representations without regard to their truth or falsity, regarding its decision to hire her at Limestone as a dental assistant at an hourly rate of $15 per hour following her interview at Limestone.

109. Defendant CMS's misrepresentations to Ms. Martindale involved one or more material facts.

110. Ms. Martindale reasonably relied on the misrepresentations by CMS to her detriment.

111. Ms. Martindale was damaged as a result of her reliance on the fraudulent representations of Defendant CMS and she is entitled to compensatory and punitive damages as a result of Defendant CMS's conduct.

Fourth Cause of Action:

Slander Per Se

112. Plaintiffs hereby allege and incorporate by reference paragraphs 1-90 as if set forth fully herein.

113. Defendant Naglich intentionally and/or with reckless disregard published a false and defamatory statement concerning Dr. Camp to Larry Linton.

114. Defendant Naglich intentionally and/or with reckless disregard published a false and defamatory statement concerning Sabrina Martindale to Larry Linton.

115. Defendant Naglich's statements regarding Plaintiffs involved imputation of indictable offenses involving moral turpitude, specifically fraudulent record keeping and theft.

116. Defendant Naglich's statements regarding Plaintiffs were false and defamatory.

117. Defendant Naglich is not protected by qualified immunity as the statements were willful, malicious, and made in bad faith.

118. Defendant Naglich's statements constitute slander per se and as such, Plaintiffs are entitled to nominal, compensatory, and/or punitive damages.

Fifth Cause of Action:

Tort of Outrage

119. Plaintiffs hereby allege and incorporate by reference paragraphs 1-90 as if set forth fully herein.

120. Defendants intentionally declined to hire Dr. Camp and rescinded the offer of employment to Ms. Martindale due to Dr. Camp's and Ms. Martindale's prior complaints against Dr. West regarding his inhuman treatment of prisoners whom Defendants have a legal duty to protect and to provide adequate care. Defendants' decisions left the prisoners at Limestone without a full-time dentist or dental assistant to provide basic dental care and emergency dental treatment for several months. It also caused Alabama taxpayers, including Plaintiffs, to pay for the dental services not rendered by CMS. Instead of hiring Plaintiffs, CMS and the ADOC hired and/or approved the employment of a number of dentists and doctors who have been sanctioned by their respective licensing boards. Moreover, CMS and the ADOC have considered permitting Dr. West, the same doctor that Plaintiffs previously reported for abusing prisoner-patients, to perform dental services on or for Alabama prisoners.

121. Defendants' actions are so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency.

122. Defendants' actions caused Dr. Camp and Ms. Martindale to suffer emotional distress so severe that no reasonable person could be expected to endure it.

123. Plaintiffs are entitled to recover compensatory and punitive damages, in an amount to be determined by the trier of fact, as a result of the aforementioned unlawful conduct.

Sixth Cause of Action:

Negligent and/or Wanton Supervision and Retention by CMS

124. Plaintiffs hereby allege and incorporate by reference paragraphs 1-90 as if set forth fully herein.

125. CMS negligently, recklessly, and/or wantonly supervised the activity of Larry Linton, its Regional Vice-President, by permitting, or failing to prevent, the negligent and/or wanton misconduct of Mr. Linton when he failed to hire Dr. Camp in retaliation for previously reporting Dr. West's abusive treatment of prisoners.

126. CMS negligently, recklessly, and/or wantonly supervised the activity of Mr. Linton by permitting, or failing to prevent, the negligent and/or wanton misconduct of Mr. Linton when he caused Ms. Martindale's offer of employment to be rescinded in retaliation for previously reporting Dr. West's abusive treatment of prisoners.

127. CMS knew, or should have discovered in the exercise of due diligence, that Mr. Linton was engaging in this negligent, reckless, wanton and/or intentional misconduct.

128. CMS's negligent, reckless, and/or wanton supervision of Mr. Linton and wanton retention of Mr. Linton after he engaged in this negligent and/or

wanton conduct caused Plaintiffs to suffer harm and damages.

129. Plaintiffs are entitled to recover compensatory and punitive damages, in an amount to be determined by the trier of the fact, as a result of CMS's aforementioned conduct.

Seventh Cause of Action:

Wanton Supervision and Retention Against Naglich

130. Plaintiffs hereby allege and incorporate by reference paragraphs 1-90 as if set forth fully herein.

131. Defendant Naglich, in her individual capacity, wantonly supervised the activity of Defendant Ferrell by permitting, or failing to prevent, Defendant Ferrell's tortious conduct against Plaintiffs, including her decision to retaliate against Plaintiffs for reporting Dr. West's inhumane treatment of prisoner-patients.

132. Defendant Naglich knew, or should have discovered in the exercise of due diligence, that Defendant Ferrell was engaging in this intentional, wanton, and retaliatory misconduct.

133. Defendant Naglich's wanton supervision of Defendant Ferrell and wanton retention of Defendant Ferrell after she engaged in this intentional and

retaliatory misconduct directly and proximately cause Plaintiffs to suffer harm and damages.

134. Plaintiffs are entitled to recover compensatory and punitive damages, in an amount to be determined by the trier of fact, as a result of Defendant Naglich's aforementioned conduct.

Eighth Cause of Action:

Wanton Supervision and Retention Against Defendant Allen

135. Plaintiffs hereby allege and incorporate by reference paragraphs 1-90 as if set forth fully herein

136. Defendant Allen, in his individual capacity, wantonly supervised the activity of Defendants Ferrell and Naglich by permitting, or failing to prevent, Defendant Ferrell's and Defendant Naglich's tortious conduct, including their decision to reject Dr. Camp's and Ms. Martindale's applications to work at Limestone in retaliation for Dr. Camp's and Ms. Martindale's prior complaints about Dr. West's inhumane treatment of prisoner-patients.

137. Defendant Allen knew, or should have discovered in the exercise of due diligence, that Defendants Ferrell and Naglich were engaging in this intentional, wanton, and retaliatory misconduct.

138. Defendant Allen's wanton supervision of Defendants Ferrell and Naglich and wanton

retention of Defendants Ferrell and Naglich after they engaged in this intentional, wanton, and retaliatory misconduct directly and proximately caused Plaintiffs to suffer harm and damages.

139. Plaintiffs are entitled to recover compensatory and punitive damages, in an amount to be determined by the trier of fact, as a result of the aforementioned conduct.

Ninth Cause of Action:

Civil Conspiracy

140. Plaintiffs hereby allege and incorporate by reference paragraphs 1-90 as if set forth full herein.

141. Defendant CMS and Defendants Ferrell and Naglich agreed to and did conspire together to engage in willful, malicious, and unlawful tortious conduct against Plaintiffs and to violate the rights of Plaintiffs as a result of Plaintiffs' prior complaints about Dr. West's inhumane treatment of Alabama prisoner-patients.

142. Plaintiffs have suffered damages as a direct and proximate result of the conspiracy between and among these Defendants in an amount to be determined by the trier of fact.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

a. That Plaintiffs be awarded compensatory damages, including front pay and back pay, and punitive damages from Defendant CMS;

b. That Plaintiffs be awarded compensatory damages, including front pay and back pay, and punitive damages from Defendants Allen, Ferrell, and Naglich, in their individual capacities;

c. That the Court declare that Defendants Allen's, Ferrell's, and Naglich's failure to hire or approve Plaintiffs violate Plaintiffs' rights under the First and Fourteenth Amendments of the Constitution of the United States of America;

d. That the Court enjoin Defendants from the continuation of such unlawful acts;

e. That Plaintiffs recover their attorney fees and costs incurred in bringing this action from Defendants; and

f. For all such other and further relief as is deemed just and proper by this Court.

Submitted this 10th day of November, 2008.

/s/ David W. Long-Daniels
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Counsel for Plaintiffs Dr. Camp and Ms. Martindale

**Admitted Pro Hac Vice*

PLAINTIFFS DEMAND A TRIAL BY A JURY OF THEIR PEERS

/s/ Lindsey C. Edelmann
Lindsey C. Edelmann

Counsel for Plaintiffs Dr. Camp and Ms. Martindale

IN THE U.S DISTRICT COURT
MIDDLE DISTRICT
NORTHERN DIVISION

DR. LARRY CAMP &
SABRINA MARTINDALE,

PLAINTIFF,

Vs CASE NO.

2:08 CV-227-WKW-CSC

CORRECTIONAL MEDICAL
SERVICES, INC, ET AL,

DEFENDANT,

DEPOSITION OF DR. LARRY CAMP

Was taken before G. Gayle Graham, Certified Court Reporter # 383 and Notary Public for the State of Alabama, on November 21, 2008, at 8:58 a.m. at the offices of Maynard, Cooper & Gale, Huntsville, Alabama.

January of 2007?

A. I can't recall. There may have been.

Q. Do you agree that as a licensed dentist in the State of Alabama, you have an obligation to report to the Dental Board any violation of the Alabama Dental Practice Act?

A. That you are aware of.

Q. That you're aware of; is that correct?

A. I believe I do.

Q. And you understood that at the time that the board complaint was made against Dr. West; correct?

A. Yes, that was my understanding.

Q. In fact you -- strike that.

Looking at page 2 of Exhibit 7, this paragraph right here, if I understand it right, it says: Information relative to any violation of Alabama Dental Practice Act by anyone in the State of Alabama should be immediately reported to the Board. Did you understand that was your obligation back in -- back at the time that you worked in the prison system for NaphCare?

that you know is a violation of the Alabama Dental Practice Act, you can't say, oh, gosh, I like him or her too much, I'm just not going to make a complaint. Is that correct?

A. Yeah, the Act doesn't discriminate about that.

Q. So you have an obligation to report the misconduct whether you want to or not; correct?

A. Correct. Everybody has got their own take about what they view the rules. I'm sure every dentist has a different opinion about it. When I heard about something as egregious as Dr. West act, I didn't think that was a gray area, didn't think it was something that was a minor offense, I thought that it was something that definitely needed to be reported to the Board.

Q. I just want to make sure that the record is clear because I can't tell if you're being clear about it or not.

A. I felt it was my duty.

Q. It was your duty, it was your obligation to do so; right?

A. Correct.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION, ALABAMA

DR. LARRY CAMP &
SABRINA MARTINDALE,

PLAINTIFFS,

Vs 2:08 cv 227-CSC

CORRECTIONAL MEDICAL SERVICES, INC., RICHARD F. ALLEN, individually and in his official capacity as Commissioner of Alabama Department of Corrections, RUTH NAGLICH, in her official and individual capacities, and LAURA FERRELL, in her official and individual capacities,

DEFENDANTS,

DEPOSITION OF SABRINA MARTINDALE

Was taken before G. Gayle Graham, Certified Court Reporter # 383 and Notary Public for the State of Alabama, on December 22, 2008, at 9:00 a.m. at the offices of Maynard, Cooper & Gale P.C., Huntsville, Alabama.

those bone files, but I'm not sure.

Q. Page 79?

A. Spatula.

Q. 80?

A. A lab knife maybe. I'm not sure.

Q. 81?

A. Spatula.

Q. 82?

A. Spatula

Q. 83?

A. Spatula. Spatula

Q. 84 is a spatula; is that right?

A. Correct.

Q. 85?

A. I'm not sure what that instrument is.

Q. You mentioned to me that you complained to the dental board, Harris Dobbs and Ralph Price, did you complain to anyone else about Dr. West's alleged conduct?

A. That's all I remember that day.

Q. I don't know that I ever got an answer to this question, but, Ms. Martindale,

did you feel like you had an obligation to report Dr. West's conduct to Harris Dobbs?

A. Because he was my boss, yes.

Q. What do you mean because he was your boss?

A. Well, if he had of just been -- just --

Q. I understand if he's just on the street, you don't have an obligation -- I mean you don't feel an obligation to report that; right?

A. No.

Q. And you wouldn't feel an obligation to just report to any random correctional officer; right?

A. Exactly.

Q. So -- and I'm trying to get what about Harris Dobbs made you think I really need to tell him about what -- or I feel obliged to go tell him what Dr. West just done?

A. That he was a superior. He was a -- I didn't know what to do. I wanted some

Q. Did you file one immediately after you talked with Dr. Camp?

A. I don't know. It was after.

Q. What caused you to file a dental board complaint?

A. I knew that it needed to be reported. It was wrongful treatment and I was one of their assistants.

Q. Why did it take you almost ten weeks to file a dental board complaint?

A. I don't know that. I think I was trying to get my employers to assist me with help.

Q. Let me back up for a minute. So, the day that it happened, you went directly to Harris Dobbs and he was the first person that you complained to; right?

A. Correct.

Q. And then after that, the next person you went to was Dr. Camp and told him about the incident?

A. I don't know that that's how it went.

Q. Well, between November 19th and the day you filed your complaint in January of 2004, what were you waiting on PHS to take care of?

A. I don't know that I was waiting on anything other than --

Q. I was just using your words. I mean you said I was waiting on PHS to take care of it.

A. I knew that he wasn't planning to come back for a while. He said that he wouldn't be back for a while.

Q. So you didn't think it was urgent?

A. No, I just -- I was consulting with Harris Dobbs and he was going to take care of it. He, I guess, assured me that -- you know, I'll do something. I'll do something.

Q. When did he assure you that he would do something?

A. Oh, it was after that day. It wasn't that day.

Q. When after that day?

A. Maybe about a week.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CASE NUMBER: 2:08CV227-CSC

DR. LARRY CAMP & SABRINA MARTINDALE,
Plaintiffs,
vs.
CORRECTIONAL MEDICAL SERVICES,
INC., et al.,
Defendants.

STIPULATION

It is STIPULATED AND AGREED by and between the parties through their respective counsel, that the videotaped deposition of Ruth Naglich may be taken before Angela Smith McGalliard, RPR, CRR, at the offices of the Alabama Department of Corrections, at 301 South Ripley Street, Montgomery, Alabama 36130, on the 20th day of August, 2008.

DEPOSITION OF RUTH NAGLICH

A. Someone who had a past history of poor clinical performance or management issues or contract compliance under a former contractor, that would be a red flag.

Q. Okay. Have you had any of those individuals?

A. Yes.

Q. And who is that?

A. Dr. Camp would be one of those individuals that would have brought up a red flag.

Q. And why was that?

A. Because he worked for NaphCare, and during his tenure with NaphCare, the state was sued by Southern Center for Human Rights and found to be -- those charges were valid in federal court; they surrounded dental -- part of the issues were dental care, compliance with scheduled -- the number of scheduled hours. So that was under Dr. Camp's charge, and that would have been -- right away, anyone that had been a primary provider in an institution where a federal court settlement agreement had been met, that would have been a concern

as a risk management issue for us.
Q. Dr. West was the dental director statewide at the time of the NaphCare contract?
MR. BIGGS: Object to the form.
A. I don't know. I don't know if he was or not.
Q. But you know Dr. Camp was?
A. I know that Dr. Camp, according to his employment history, was at Limestone. I didn't know him by name.
Q. Did you review his employment application?
A. The time frames that Dr. Camp was employed were mentioned to me by Mr. Linton. I don't recall if it was in writing. I know it was discussed, because it was a red flag that he had been there prior with NaphCare, and he had only been with PHS about sixty days.
Q. And him being with PHS sixty days was a cause of concern?
MR. LUNSFORD: Object to the form.

Mr. BIGGS: Same objection.
A. Very much so.
Q. And why is that?
A. Dentists are hard to recruit.
And generally in a startup, you're going to -- When you're trying to fill positions, a dentist that -- or any provider is important, and you're going to -- obviously, it's going to take strong reason not to take that person, if someone is in license and good standing and they're refused or let go.
Q. Did you -- I'm sorry, did you inquire with PHS why Dr. Camp was only with the company for sixty days?
A. I was approached by Dr. Hartman when we asked for the pay-back records as part of my monitoring responsibilities for CMM were to review hours of -- that PHS was providing the actual hours that were in the contract. Dr. Hartman let me know that he had -- that there was not -- the dentist was released from Limestone, and then I think subsequently after that, the dental assistants were, and it was due to their

failure to comply with the required hours, and fraudulent reporting of hours, I believe, on the dental assistant's place. So he let me know.

Q. Who is Dr. Hartman?

A. Dr. Hartman was the chief operating officer for Prison Health Services.

Q. When did he let you know this?

A. It would have been around -- it was probably around January of -- let's see. It was '03. January of '04, maybe February of '04, around that time, because we were pressuring Prison Health Services to provide payroll information and verification of hours.

Q. And this was in your role with the Department of Corrections?

A. That was a requirement of the contract, yes.

Q. I'm sorry, when did you start with the ADOC?

A. I was under contract with Correctional Medical Services, that contract was implemented in November or December of

'03, and that contract continued on. I left Correctional Medical Services and was put into a provisional appointment by Commissioner Campbell in October of 2004.

Q. Okay. So you were working on behalf of the ADOC as a consultant?

A. Yes, ma'am.

Q. And the CEO of Prison Health Services told you that Dr. Camp -- did he mention him by name?

A. I don't recall if he was mentioned by name. But there was a concern. Dr. Bick was concerned about the care. It was my role as the contract monitor to assist in looking, at that point in time, on the consent decrees that were out there with Leatherwood. There were discussions about dental services, the backlog of dental services, Dr. Bick's criticism of dental services. And that would have been in a form. And we were asking to verify the hours of services so that we could respond back to Dr. Bick. And at that point in time, Dr. Hartman, because it was specific to Limestone, informed me that the dentist

was gone.
Q. And he was gone because?
A. There were issues with his time reporting in accordance to the contract.
Q. Did he show you any documentation of that?
A. I don't recall.
Q. Did he tell you that Laura Ferrell discharged Dr. Camp?
MR. LUNSFORD: Object to the form.
MR. BIGGS: Same objection.
A. No. I don't remember him specifically telling me that.
Q. Has Laura Ferrell told you she discharged Dr. Camp?
MR LUNSFORD: Object to the form.
MR. BIGGS: Same objection.
A. Yes.
Q. Did she tell you why she discharged Dr. Camp?
A. Failure to follow supervisor's instructions, and being where he was

know, staff would be just talking, and somebody was -- that was pretty much it. I mean, just that there had been an incident when Ms. Martindale was terminated.

Q. Okay. So it was at her termination that she was visibly upset?

A. Again, this is just secondhand --

Q. But that was your understanding?

A. That was my understanding.

Q. She was terminated and was upset?

A. Yes, ma'am.

Q. That was the same incident that was being described to you?

A. Yes, ma'am. Uh-huh.

Q. Okay. Did Laura Ferrell tell you she had discharged Sabrina Martindale?

MR.BIGGS: Object to the form.

A. Ms. Ferrell had just told me she had been let go.

Q. Where you aware that Sabrina Martindale had filed a complaint with the

Alabama Board of Dental Examiners against Dr. West?

A. No.

Q. You don't have any personal knowledge as to why Dr. Camp and Sabrina Martindale were discharged by PHS, do you?

A. What do you mean, by personal knowledge? I'm sorry.

Q. Your only knowledge about the reasons they were discharged -- Let me start over.

Your only knowledge of the reasons that Dr. Camp and Sabrina Martindale were discharged, is based on information you received for other people; is that correct?

A. From representatives of Prison Health Services.

Q. You didn't participate in their discharges?

A. No.

Q. Have you ever -- Aside from talking to the COO, have you ever contacted PHS to find out why they were discharged?

MR. LUNSFORD: Object to the form.

candidate being offered by CMS?

MR. LUNSFORD: Object to the form.

MR. BIGGS: Object to the form.

A. It would be myself or a warden.

Q. Or a warden?

A. Uh-huh.

Q. Okay. Does Laura Ferrell have the ability to accept or reject a candidate?

MR. BIGGS: Objection

A. No.

Q. Does Larry Linton -- Have you made CMS aware of who has the authority to approve or disapprove a candidate?

MR. BIGGS: Object to the form.

A. Yes.

Q. And CMS understands that it's either you or a warden?

A. Yes.

MR. BIGGS: Object to the form

Q. Do you supervise the wardens?

December 11, 2003

Dr. Will Mosier, PHS Regional Medical Director
Embassy Suites-Suite #624
300 Tallapoosa Street
Montgomery, Alabama 36104

Dear Dr. Mosier,

I am writing to share some of my serious concerns about the dental operations within the Alabama corrections system and its director Dr. Mike West.

Current shortcomings in supply, equipment, lab/prosthetic support and personnel are adversely affecting the quality and quantity of dental health care available to the inmate population in the state system. A failure of leadership of Dr. West is at the core of all of these problems, as he has been the director through numerous contractors and is charged with the responsibility to ensure at least adequate care for the inmates.

As a leader Dr. West should be setting and monitoring standards for dental practice in the prisons. Having seen him treat inmates the best descriptors would be brutal and painful (methods he

knows will reduce demand for dental services). This is not only my appraisal, but also numerous officers and staff at Limestone Correction Facility who recently observed him treat inmates (he only allows one inmate in the office at a time so that no inmate can witness his treatment of another). Additionally, it was reported to me that he used his same favorite surgery instrument repeatedly on numerous patients without sterilization. Inmates do not have a choice of providers and should not be subjected to this type of treatment. Any dentist who practices like this should not be practicing, much less be in a position of authority/responsibility.

The most recent State Board of Dental Examiners disciplinary actions suspended Dr. Edward Strother for not changing gloves and using instruments that were not properly sterilized. Dr. Strother until recently worked at Bibb Correctional Facility and was, no doubt, using the same unsanitary practice techniques under Dr. West's directorship.

Dental supply orders must go through Dr. West for approval and forwarding. It has been over two months since supplies have been received. Requested items are often deleted from the order. Most recently, a low cost periodontal sonic scaler was

ordered to treat patients with severe/acute periodontal conditions. The reason given for deletion was that it wasn't needed because hygienists are being hired. What instruments will they use? What do we use in the interim?

Dental equipment status varies from site to site. My experience is limited to Limestone and St. Clair where the equipment is minimal to non-functional. The St. Clair equipment was virtually destroyed in the riots nearly 20 years ago and has been patched ever since, having long ago past its useful life. I have been told, by yourself and Dr. Keldie that PHS has money set aside for some help on equipment at St. Clair.

Laboratory support for removable prosthetics has declined from turn around times of less than one month when I started to over three months now. When called, one of the lab managers said that Dr. West had directed him to hold off on returning cases two months ago. The results of poor lab support are delayed/deferred prosthetic care for inmates and frustration for treating dentists. Dr. West's verbal guidance was that an inmate must have 7 missing teeth on the same arch as a prerequisite before a partial denture can be made; yet I received a transfer

case from Dr. West to Limestone which had only 4 teeth replaced. Dr. West chose the two labs we can use and I know of no bidding that took place for the business or any performance standards they must meet.

Limestone remains without a staff dentist. For 15 months I covered Limestone and Decatur work release 3 days/week and St. Clair the other 2 days without a backlog of care for any category at both facilities. I offered to continue with my service to Limestone until a new staff dentist was found (St. Clair had been upgraded to a full time position). I was not willing to take the reduction in pay that was offered by Dr. West and returned to St. Clair. No staff dentist has been hired yet for the largest prison in the state.

I recently retired after nearly 26 years in the military where I commanded numerous organizations and always took pride in taking care of people and mission accomplishment. In my 15 months of covering both facilities Dr. West never visited either site. Neither has he called to give me any new guidance in the six weeks since the new contract with PHS began.

Current dental conditions within DOC are not conducive to attract and retain quality personnel and I will soon leave if conditions do not change.

Please feel free to contact me if I can be of further assistance. Home (205) 467-6789, Work (205) 467-6111.

Respectfully,

/s/ Dr. Larry R. Camp, D.M.D.
Dr. Larry R. Camp, D.M.D.
COL (Ret), U.S. Army
St Clair Staff Dentist

Cc: Mr. Donal Campbell
Dr. Carl Keldie

Board of Dental Examiners of Alabama
5346 Stadium Trace Parkway, Ste-112
Hoover, Alabama 35244-4583
Phone (205) 958-7267 Fax (205) 985-0674

Complaint Form

Please complete this form in ink or with a typewriter

Name of Complaining Person : *Dr. Larry R. Camp*

Home Address: *470 MacDonald Lake Rd. Springville, Al 35146*

Home Telephone *(205) 467-6789*

Work Telephone *(205) 467-6111 Ext. (Dental) 236*

Name, address, phone for dentist and/or hygienist that you are complaining about:

Dr. Mike West
Atmore AL

Write a detailed description of complaint. Include date(s), names(s), of witness(es) and documents, if any [Original document was handwritten]:

This complaint is based mainly on the information provided to me by the Dental Assistant (Sabrina) at Limestone Correctional Facility. The basics of the complaint are as follows:

1. *Delivery of brutal, painful dentistry to patients*
2. *Repeatedly using unsterilized surgery instrument on numerous patients.*
3. *Using unaccepted filling technique/material.*
4. *Failure to exercise qA/qL through the Alabama Department of Corrections dental facilities:*
   (Dr. Strother worked at the Bibb county correctional facility)
   Dr. West currently is and has been the Dental Director for DOC Facilities.
   Sabrina can give the details and a list of patient treated and witnesses.
   I personally, briefly witnesses his treatment during my brief orientation (Jul 02') and it was eye opening!
   I have heard my accounts form Inmates since then - he makes quite an impression.

Additional documentation enclosed (please circle):
NO YES Number of Pages _____

Signature */s/ Dr. Larry R. Camp* Date *17 Dec 03*

Board of Dental Examiners of Alabama
5346 Stadium Trace Parkway, Ste-112
Hoover, Alabama 35244-4583
Phone (205) 958-7267 Fax (205) 985-0674

Complaint Form
Please complete this form in ink or with a typewriter

Name of Complaining Person : *Sabrina Parmley Martindale*

Home Address: _____

Home Telephone _____

Work Telephone *(256) 216-2285*

Name, address, phone for dentist and/or hygienist that you are complaining about:

Dr. Mike West
Atmore AL

Write a detailed description of complaint. Include date(s), names(s), of witness(es) and documents, if any [Original document was handwritten]:

On November 19, 2003 Dr. Mike West reported to work at Limestone Correctional facility to fill in as a Dentist because we had lost out full time Dentist. Dr. West is our Dental Director we work for PHS. He is required to fill in throughout the state prisons if we

are short staffed. At this time I have been at the prison about a year and had never met Dr. West before until this day. I was a little worried because I had always heard from officers, staff, inmates etc. rumors about his dentistry work; too my surprise its true, and I feel concerned and want to report this behavior. We had 18 patients scheduled on 11-19-03 and 1 inmate was outgated to court so we treated 17 scheduled and a couple of emergency's 1 e.r. patient was put in our infirmary on IV meds. He begged me not to let him be treated by this doctor. It was because the patients were coming out upset and in pain saying "Dr. West is Brutal."

This man was swollen and in a lot of pain and I was afraid of what Dr. West would do so the officer and I had him put in the infirmary until our part time Dentist could see him.

When we started on the first patient that morning Dr. West informed me he liked to use his own instruments that he brought with him. His instruments were in sterile bags when he opened them. Our first patient was an extraction he opened a forcep that I had never seen before we extracted the tooth. When I was cleaning up and had disposed of the instrument he asked for it back and told me to wipe it off with a wipe that is was his favorite tool and he didn't bring another one he only had 1. I told him I had more sterilized instruments and showed him he said "no that's ok, between you and me this is the tool I like just wipe it off.

I was in shock and when I went to get the next patient I told my Director of Nursing what happened the second patient was a repair/refill the 3rd was extraction with a flap/section. He used that same forcep without sterilizatic and we proceeded to do this all day. I was very upset and talked with the D.O.N. again. Other staff members seen up upset and kinda knew what was going on and knew it was my first time to work with Doctor West. The patients would yell and tell him their hurting in pain and not numb enough, he would yell and tell them to shut up! or Get out after he had started working on them and part of the tooth was still in. It was awful and Brutal. He (Dr. West) laughed and said "If you get a few like that the" word will get out and they won't fill out sick call slips to come back. That'll cut down!

After we finished with the patients he put his instruments in a black duffle bag rolled up in a napkin and left. We didn't sterilize nothing before he left. He had a 6 hour drive back home or to the prison he work at full time.

I noticed that he left to elavators that we also used more than once and that and a suture lat was all I had to sterilize after 17 or more patients. He was comfortable enough to do this in front of me and had just met me. I'm sure this is regular behavior. I told my boss that I <u>will not</u> work with him again. And I haven't.

This is disappointing and very scary we have HIV inmates and Heppatitus A, B, C and other things here. I'm concerned.

Thank you,
Sabrina Martindale

Additional documentation enclosed (please circle):
NO YES Number of Pages ____

Signature */s/ Sabrina P. Martindale* Date *1/2/04*

IN THE MATTER OF:	) BEFORE THE BOARD) OF)
DAVID MICHAEL WEST, D.M.D.	) DENTAL EXAMINERS) OF ALABAMA)
LICENSE No. 2831	)

AMENDED FINAL ORDER

This cause came before the Board of Dental Examiners of Alabama (hereinafter also referred to as the "Board") on an Order To Show Cause issued to David Michael West, D.M.D. (hereinafter also referred to as the "Respondent"). A hearing was convened on September 2, 2005 at which time the Respondent was present and represented by counsel. Prior to the presentation of testimony it was agreed by the Board, the Respondent and attorneys for the Board and the Respondent to resolve the matters at issue by amending the Final Order issued on May 5, 2005, by including as paragraph 4 of said Order the following language from the Order of the Board dated December 18, 1980, "It is further Order of the Board that if the said David Michael West is found in the future, after notice and hearing, to be in violation of the Alabama Dental Practice Act, his license to practice dentistry in this State shall be permanently revoked."

This being the agreement of the parties and their respective attorneys, the May 5, 2005 Final

Order of the Board is hereby amended to read in its entirety as follows:

FINAL ORDER

This cause came before the Board of Dental Examiners of Alabama (hereinafter also referred to as the "Board") on a Complaint against David Michael West, D.M.D. (hereinafter also referred to as the "Respondent") and evidence having been adduced thereon, the Board has determined that the Findings of Fact and Conclusions of Law set out below, are supported by the preponderant weight of evidence and law.

MOTIONS

1. A Request for Discovery, filed by the attorney for the Respondent, was GRANTED.

2. A Motion For Protective Order Or to Stay Discovery, filed by the attorney for the Board, was GRANTED.

3. A Motion To Continue and For Protective Order filed by the attorney for the Board, was GRANTED.

4. A Motion For Protective Order filed by the attorney for the Respondent, was DENIED.

5. An Amended Motion To Go Forward, filed by the attorney for the Respondent, was DENIED.

6. An oral Motion to Continue, made by the attorney for the Respondent, was GRANTED.

7. A Motion To Allow Depositions, filed by the attorney for the Respondent, was GRANTED in part, and DENIED in part.

8. A Motion To Compel, filed by the attorney for the Board, was GRANTED.

9. A Motion to Compel, filed by the attorney for the Respondent, was GRANTED.

10. A Motion To Preclude A Witness From Testifying, filed by the attorney for the Respondent, was DENIED.

11. A Motion to Preclude, filed by the attorney for the Board, was GRANTED.

12. A Motion to Dismiss Or In The Alternative Motion To Preclude Testimony Of Martindale and Camp, filed by the attorney for the Respondent, was DENIED.

13. A Motion To Preclude Testimony Of Christy Gonzales and Officer Thompson, filed by the attorney for the Respondent, was DENIED.

14. An oral Motion In Limine, made by the attorney for the Respondent, was GRANTED in part.

15. An oral Motion To Produce Documents, made by the attorney for the Board, was DENIED.

FINDINGS OF FACT

1. The Respondent, David Michael West, D.M.D., is licensed to practice dentistry in the state of Alabama.

2. The Respondent was served with a Notice of Hearing and appeared in person and with counsel at the hearing. (Bd.'s Ex. 1).

3. On November 19, 2003, dental services were provided to inmates in the Alabama Department of Corrections by Prison Health Services (PHS) for which the Respondent served as the Director of Dental Services.

4. On that same date, Sabrina Martindale (Martindale) was a dental assistant employed by PHS at the Limestone Correctional facility in north Alabama. (Bd.'s Ex. 2 and 3).

5. While the evidence is conflicting, on November 19, 2003, PHS indicated in its internal correspondence that it adhered to the Infection Control Practices required by Board Rule 270-X-2.15 which references compliance with the guidelines promulgated by the Centers for Disease Control and Prevention (CDC Guidelines). (Bd.'s Ex. 4).

6. Due to the termination of Dr. Larry Camp, the Limestone Correctional Facility was without a full time dentist on November 19, 2003, and the Respondent was required to provide dental care to those inmates needing dental treatment on that date.

7. While the sign-in/sign-out sheets are incomplete for the Limestone Correctional Facility for November 19, 2003, it is undisputed that the Respondent was present that day to provide dental services and Martindale worked as his dental assistant. (Bd.'s Ex. 6).

8. There was a "daily sheet" for November 19, 2003, indicating the inmates to be provided dental treatment, a description of the dental services rendered such as extractions, order to medicate, and totals of various services. (Bd's. Ex. 7).

9. On the daily sheet for Nov. 19, 2003 there were approximately 18 inmates identified, and while the dental charts are incomplete for at least one inmate treated that day by the Respondent, it is undisputed that four inmates had one tooth extracted. (Bd.'s Ex.'s 7, 8, 9, 10 and 11).

10. Martindale, after assisting in the extraction of a tooth from the first patient to be seen on November 19, 2003, became concerned about what she perceived as a lack of infection control procedures to the point that she was clearly upset and complained to other PHS employees including the Health Services Administrator.

11. While there is conflicting evidence, it is undisputed that when the Respondent was required to travel from Fountain Correctional Facility in Atmore, Alabama to fill-in at other correctional facilities throughout Alabama, he carried his own dental instruments.

12. According to his dental assistant Phyliss Kent, she would pack the bag of dental equipment for the Respondent before any such trip and sought to include more than enough equipment to meet the needs of those inmates to be treated by the Respondent.

13. And while the evidence is conflicting, the Respondent's use of what is generally described as "Lig-A-Jet" syringes to anesthetize a tooth prior to extraction is not an uncommon or unaccepted procedure.

14. In January, 2004, Martindale filed a complaint with the Board identifying concerns regarding the Respondent's perceived laxity as regards infection control procedures on November 19, 2003. (Bd.'s Ex. 12).

15. On November 19, 2003, William Harris Dobbs, Jr. was the Health Services Administrator at Limestone Correctional Facility and acknowledged that Martindale complained to him regarding her perceptions of the Respondent's lack of adherence to infection control procedures.

16. The Respondent has worked in the correctional facilities of the state of Alabama for approximately 30 years in the employment of several companies with which the state of Alabama has contracted for dental services for inmates.

17. While there have been some complaints and/or lawsuits filed regarding the Respondent's dental care provided to inmates, he is generally considered a competent provider to whom other dentists working in the correctional system would refer complicated procedures, particularly difficult extractions.

CONCLUSIONS OF LAW

1. The Board of Dental Examiners of Alabama has jurisdiction of this cause pursuant to *Code of Alabama* 1995, Sections 34-9-24 and 41-22-12 (a) and (b).

2. The Respondent was properly served with the Notice of Hearing, appeared in person and with counsel.

3. The Respondent's license to practice dentistry in the state of Alabama is due to be SANCTIONED, in that, he is guilty of violating *Code of Alabama* 1975, Section 34-9-18 (a) (15) having, on November 19, 2003, violated Board Rule 270-X-2.15 by failing to meet or comply with the current recommendations of the Centers for Disease Control and Prevention's Recommended Infection-Control Practices for Dentistry, 1993.

ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED as follows:

1. The Respondent shall pay to the Board an administrative fine in the amount of One Thousand ($1000) Dollars; and

2. The Respondent shall pay to the Board administrative costs in the amount of Three Thousand Five Hundred ($3500) Dollars; and

3. Both fine and costs shall be paid within ninety (90) days of the effective date of this Order.

4. It is the further Order of the Board that if the said David Michael West is found in the future, after notice and hearing, to be in violation of the Alabama Dental Practice Act, his license to practice dentistry in this State shall be PERMANENTLY REVOKED.

Done, this 8th day of September, 2005.

/s/ J. Clyde Yarborough, D.M.D.
J. Clyde Yarborough,
D.M.D., President Board of
Dental Examiners of Alabama

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(2)

No. 10-1117

Supreme Court, U.S.
FILED
MAY 11 2011
OFFICE OF THE CLERK

In The Supreme Court of the United States

RUTH NAGLICH and LAURA FERRELL,

Petitioners,

v.

DR. LARRY CAMP and SABRINA MARTINDALE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where there is direct evidence that Petitioners retaliated against Respondents, a former prison dentist and dental assistant, by preventing the hiring of Respondents based on Respondents' reporting a colleague to the Dental Board and the Alabama Department of Corrections for using brutal, painful, and unsanitary practices on inmates.

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STATEMENT OF THE CASE

I. Relevant Facts

On this case challenging the denial of summary judgment, Respondents refer to the district court's recitation of the relevant facts. App. 12a-20a. For purposes of assessing the Petition, the following facts are most salient:

> Dr. Larry Camp (a licensed dentist) and Ms. Sabrina Martindale (a dental assistant) are former employees of Prison Health Services, Inc. ("PHS"), a former medical services contractor to the Alabama Department of Corrections ("ADOC"). App. 12a-13a.
>
> While employed by PHS, Camp and Martindale independently filed complaints against PHS's Director of Dental Services, Dr. David Michael West. *Id.*
>
> Camp sent a letter to PHS's Regional Medical Director and to the ADOC Commissioner on December 11, 2003. App. 13a. Camp followed that letter with a formal complaint to the Board of Dental Examiners of Alabama ("Dental Board") on December 17, 2003. *Id.* Camp's December 11 letter and December 17 complaint both stated that West used "brutal and painful" methods for the purpose of reducing demand for dental services, that West re-used unsterilized equipment after treating prisoners (who may well have been infected with HIV and/or hepatitis), and that West failed to maintain adequate supplies for providing dental services. App. 163a-169a.

Specifically, Dr. Camp told the ADOC Commissioner and PHS that

> Having seen [Dr. West] treat inmates the best descriptors would be brutal and painful (methods he knows will reduce demand for dental services). This is not only my appraisal, but also numerous officers and staff at Limestone Correction Facility who recently observed him treat inmates (he only allows one inmate in the office at a time so that no inmate can witness his treatment of another). Additionally, it was reported to me that he used his same favorite surgery instrument repeatedly on numerous patients without sterilization. Inmates do not have a choice of providers and should not be subjected to this type of treatment. Any dentist who practices like this should not be practicing, much less in a position of authority/responsibility.

App. 163a-164a.

Martindale filed a complaint with the Dental Board on January 2, 2004. App. 14a. Martindale's complaint referred to a specific incident in which Dr. West insisted upon using unsterilized dental equipment because it was his "favorite" instrument. App. 171a.

Using unsterilized equipment violates the Centers for Disease Control and Prevention's

(the "CDC") Recommended Infection-Control Practices for Dentistry, and increases the risk of transmission of HIV by over 3700%. App. 39a. The increased risk of HIV transmission affects both inmates and the public as a whole. *Id.*

The Dental Board sanctioned Dr. West on September 8, 2005 for failing to meet the CDC's Infection-Control Practices. App. 180a.

Less than one month after filing the complaints, Petitioner Ferrell, who at the time was a Regional Vice President for PHS, informed Camp that his employment with PHS was being terminated. App. 14a. Camp testified that Ferrell told him that the reason for his termination was failure to follow policies and procedures and not following the PHS chain of command. App. 14a-15a. Ferrell likewise testified that she "[didn't] like that as a regional vice president [of PHS] that [she] was shown a letter of [Dr. Camp's] complaints in front of my client [the ADOC Commissioner]." App. 14a. Less than a year after filing her Dental Board complaint and shortly after her testimony during a Dental Board disciplinary hearing for West, Martindale's employment with PHS was also terminated by Ferrell. App. 15a.

In 2007, the ADOC changed its healthcare contractor from PHS to Correctional Medical Services, Inc. ("CMS"). *Id.* The contract between ADOC and CMS granted ADOC the authority to reject personnel proposed by

CMS. *Id.* Respondents both applied for positions with CMS – Camp applied to be an independent contractor dentist and Martindale applied to be an employee dental hygienist. App. 15a-16a, 19a-20a. CMS thought favorably of Respondents' applications and was prepared to engage both of them. App. 16a, 19a.

Before engaging either of Respondents, Larry Linton, CMS's Regional Vice President, received an email from Dr. West stating:

> I received an email from Mark about a future hire at Limestone – Larry Camp.
>
> This is the guy who wrote everyone from the commissioner down to stir up trouble for PHS. I guarantee you he will not work an 8 hour day consistently. The Board believed his crap against me. No one else did!

App. 16a.

Linton then emailed Petitioners Naglich and Ferrell, who were both employed by ADOC at the time,[1] to ask their views on Dr. Camp as a prospective dentist. App. 16a-17a. Ferrell responded "Absolutely not!" and "This is the one who had us all before the State Dental

---

[1] Ferrell was the ADOC Medical Systems Administrator and Naglich was the Associate Commissioner of Health Services. App. 17a.

> Board [regarding] Dr. Mike West." App. 17a. After that email, Linton and CMS stopped pursuing Dr. Camp as a potential contract dentist. *Id.*
>
> After sending an email stating that it was not "in our best interest" to hire Dr. Camp, Naglich spoke with Linton about Camp and Martindale. App. 17a-18a. At the time she made the recommendation against Camp, Naglich had never supervised Camp and had no personal knowledge of any alleged complaints or issues with him. App. 18a. She did, however, know about the letter Camp sent to the ADOC and that a Dental Board complaint had been filed against West. *Id.* While speaking with Linton about Camp, Naglich brought up Martindale's name and mentioned that she had also been fired by PHS. App. 20a. After this conversation, Linton decided not to hire Martindale, either. *Id.*

In their statement of the case, Petitioners misrepresent the factual record in two important respects. First, Petitioners claim that "PHS had established 'a general policy requiring that dentists report misconduct to PHS and the Dental Board.'" Pet. 6. However, there is no evidence of such a "general policy." Rather, the district court assumed for the sake of argument that such a policy existed, and then rejected Petitioners' argument. Pet. 6 (*citing* App. 42a).

Petitioners' second factual misrepresentation is that "Camp acknowledged a 'professional obligation'

to report a fellow dentist to the Board in the event of misconduct." Pet. 6 (*citing* App. 146a-147a). First, the phrase "professional obligation" appears nowhere on those pages of the record, rendering Petitioners' use of quotation marks inappropriate. *See* App. 146a-147a. More importantly, though, Camp was testifying about ethical obligations that he personally felt as a medical professional – *not* any obligation imposed upon him as a result of his specific employment with PHS. *Id.*

Framed in this light, the record evidence is clear that Dr. Camp's complaints to the Dental Board and the ADOC Commissioner were not part of his PHS job duties and Martindale's complaint and testimony to the Dental Board were not part of her PHS job duties. As a result, the district court properly denied summary judgment to Petitioners on qualified immunity grounds and the Eleventh Circuit likewise properly affirmed that denial.

II. Procedural Background

Petitioners mischaracterize the Eleventh Circuit's ruling. First, Petitioners claim that the Eleventh Circuit accepted "the facts set out by the district court, including, apparently, that Respondents' employer, PHS, had 'a general policy requiring that dentists report misconduct to PHS and the Dental Board.'" Pet. 11. As set forth above, and as evidenced by Petitioners' use of the word "apparently," neither

the district court nor the Eleventh Circuit made any such factual finding.

Second, Petitioners refer to Alabama Code section 34-9-2 and claim that the Eleventh Circuit "accepted that Alabama statutes can help determine the scope of employee duties." Pet. 11 (*citing* App. 8a n.2). In fact, the Eleventh Circuit noted that Alabama statutes "may impose on Camp a general responsibility as a medical professional to report knowledge of other dentists' misconduct to the Dental Board, ***but his job responsibilities as an employee for PHS did not make reporting to the Dental Board part of his official duties***." App. 8a n.2 (emphasis added). In citing *Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008), the Eleventh Circuit was noting that statutory obligations could conceivably be relevant to job duties, but only "to the extent that [the statute] creates responsibilities for that employee's specific job" – a condition that cannot be said to apply to the Alabama Code. App. at 8a n.2.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The gravamen of Petitioners' argument is that they believed they were allowed to retaliate against Respondents based on Respondents' alerting the Dental Board and the ADOC to "brutal," "painful," and unsanitary dentistry practiced on inmates by Dr. West. Petitioners claim qualified immunity applies

because a purported conflict amongst the circuit courts renders this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), unclear. No such circuit split exists. Rather, the circuit courts have uniformly applied *Garcetti*, reaching varying outcomes only because of varying facts. The lower courts correctly applied *Garcetti* to the facts of this case.

Additionally, the Eleventh Circuit properly denied qualified immunity to Petitioners because they had fair warning that retaliation against Respondents was unlawful. Reasonable officials in Petitioners' circumstances would have known that retaliating against Respondents for speaking to the ADOC and the Dental Board would violate their First Amendment rights. A factually analogous case is not required to override a qualified immunity defense where the constitutional violation is apparent.

Last, Petitioners' attempt to manufacture a circuit split with the First Circuit based on *Philip v. Cronin*, 537 F.3d 26 (1st Cir. 2008), must fail because (1) Petitioners ignore an alternative holding and (2) *Philip* involved a "collective decision" and this case did not. The Eleventh Circuit's opinion did not create or contribute to a split of authority.

Petitioners have entirely failed to show an issue worthy of this Court's consideration. Accordingly, the Court should decline the Petition to issue a writ of certiorari, and allow the case to proceed to trial.

I. The Lower Courts Correctly Applied the Rule of *Garcetti v. Ceballos* to the Summary Judgment Record in this Case.

Public employees do not forfeit their rights as citizens to engage in free speech when they accept public employment.[2] Nevertheless, a public employee's free speech rights must be balanced against a State's interest as an employer in controlling the job-related speech of its employees.[3] A third interest to be considered in evaluating public employee speech is that of the general public, which has a strong interest in receiving the well-informed opinions of government employees about the inner workings of the government.[4]

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[2] *See Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment."); *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right, and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.") (internal quotation marks and citations omitted).

[3] *Pickering v. Bd. of Ed.*, 391 U.S. 563, 569 (1968) ("The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

[4] *Garcetti*, 547 U.S. at 419 ("The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in

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Considering all the applicable interests, this Court has held that there is an exception to the First Amendment's free speech protections for employees who make statements in their capacities as public employees. *Garcetti*, 547 U.S. at 416-21. ("[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. . . . [But] when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."). A public employee speaks *qua* public employee (and not *qua* citizen) only when he speaks "pursuant to [his] official job duties." *Id.* at 416.

Following *Garcetti*, the threshold question in public employee free speech cases is whether the speech was made "pursuant to . . . official job duties." If so, then the speech is not protected by the First Amendment. If not, then the speech may still be protected, if it was on a matter of public concern and the state does not have a sufficiently strong interest to counterbalance the free speech rights.

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civic discussion."); *Pickering*, 461 U.S. at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

A. There Is No Circuit Split Following *Garcetti*.

This Court's most recent decision on public employee speech, *Garcetti*, did not announce a new rule of law; it clarified the proper application of existing precedent, such as *Pickering*.[5] For precedential purposes, the most salient fact about *Garcetti* is that the parties admitted that the speech was made "pursuant to . . . official job duties." *Garcetti*, 547 U.S. at 424. Thus, once the line between citizen speech and employee speech was drawn, the result in *Garcetti* became obvious. *Id.* Recognizing that not all future citizen/employee speech cases would be undisputed, the Court went on to describe the rationale behind the "pursuant to . . . official job duties" test, and further described several non-dispositive factors that could guide the "pursuant to . . . official job duties" analysis. *Id.* at 424-25.

To aid future courts in determining whether speech was "pursuant to . . . official job duties," this Court explained that Ceballos wrote his memo "because that is part of what he, as a calendar deputy, was employed to do." *Id.* at 421. The Court then explained that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee

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[5] *See Garcetti*, 547 U.S. at 424; *Freitag v. Ayers*, 468 F.3d 528, 544 (9th Cir. 2006) ("The Court in *Ceballos* relied in large part upon its ruling in *Pickering v. Board of Education*.").

might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22. To further clarify, the Court contrasted the facts before it with *Pickering*, where the public employee's speech was analogous to speech engaged in "by numerous citizens every day." *Id.* at 422. The Court further noted that "employers can [not] restrict employees' rights by creating excessively broad job descriptions." *Id.* After *Garcetti*, each of these factors is relevant to the ultimately practical inquiry of whether the speech was "pursuant to . . . official job duties."

As anticipated by *Garcetti*, the courts of appeals have made the same practical inquiry in various factual contexts.[6] As a result, some cases have held that the employee speech was pursuant to official job duties, and other cases have held that it was not.[7]

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[6] *Garcetti*, 547 U.S. at 418 (noting that the circuit courts will face "'the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal.' The Court's overarching objectives, though, are evident.") (internal citation omitted, ellipsis in original).

[7] *Compare Freitag*, 468 F.3d at 545 ("Under *Ceballos*, Freitag does not lose her right to speak as a citizen simply because she initiated the communications while at work or because they concerned the subject matter of her employment.") *with Casey v. West Las Vegas Ind. Sch. Dist.*, 473 F.3d 1323, 1329 (10th Cir. 2007) (holding that "because advising her employer on 'the lawful and proper way to conduct school business' was admittedly part of her portfolio, we cannot help but conclude

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Given the variety of public jobs, it is hardly surprising that some employees speak "pursuant to their official job duties" and others do not. Additionally, given the number of different audiences for speech – supervisors within the chain of command, coworkers/subordinates, the media, the legislature, or law enforcement – the relevant facts vary widely.[8] From this, Petitioners erroneously conclude that the courts of appeals have made "varied and conflicting statements of the determinative inquiry after *Garcetti*." Pet. 28.

Indeed, Petitioners claim the courts of appeal are applying no fewer than ***nine*** distinct tests to assess whether speech was made "pursuant to . . . official job duties" or not. Pet. 25-27. That is an exaggeration, at best.[9] As a careful reading makes clear, the courts of

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that Ms. Casey made these statements pursuant to her official duties.").

[8] *Compare Fox v. Traverse City Area Public Sch. Bd. of Ed.*, 605 F.3d 345, 346-47 (6th Cir. 2010) (holding that teacher's speech about class size made within chain of command was pursuant to job duties under *Garcetti*) *with Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) ("If however, a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen.") *and Rohrbaugh v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 747 (10th Cir. 2010) (noting that "speech directed at an individual or entity outside of an employee's chain of command is often outside of an employee's official duties").

[9] Petitioners claim that at least six circuit cases support two separate "tests" each. Pet. 25-26, nn. 6-9. But as a matter of

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appeals have followed *Garcetti*'s mandate to make a practical inquiry into the job duties and determine whether the speech was in fact "pursuant to" those duties.[10] The Eleventh Circuit has likewise applied the "pursuant to . . . official job duties" test. *See Abdur-Rahman v. Walker*, 567 F.3d 1278, 1282-83 (11th Cir. 2009) (inquiring whether speech was "made pursuant to an employee's job duties"). The courts of appeals may have used different language to describe *Garcetti*'s practical inquiry in different factual scenarios; but they are all applying the same "pursuant to . . . official job duties" test.

Petitioners' claim that a circuit conflict justifies certiorari must fail because there is no split among the circuits, but rather a uniform application of *Garcetti*.

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jurisprudential logic, a court can apply only one test to a set of facts at a time. Adding to the confusion, Petitioners repeatedly insert a new factor into the analysis – whether the speech can be "divorced from" the job – without any support. *E.g.*, Pet. 27.

[10] *E.g.*, *Casey*, 473 F.3d at 1328 ("The Supreme Court last Term in *Garcetti* did revisit *Pickering*'s first prong, however, and added some clarity to the question when a public employee speaks as a citizen rather than as an employee."); *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007) (applying *Garcetti* to speech by corrections officer reporting security lapse).

B. There Is No Evidence of Respondents' "Official Job Duties" Sufficient to Reverse the Eleventh Circuit's Decision.

Regardless of any purported circuit split, Petitioners affirmatively claim that Respondents spoke "pursuant to their official job duties," rendering their speech constitutionally unprotected. *E.g.*, Pet. 18. A summary judgment movant who does not bear the burden of proof at trial may win summary judgment by negating an element of a claim. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). To do that, Petitioners were obligated to prove with undisputed evidence that Respondents' speech was "pursuant to their official job duties." *Id.*; *Garcetti*, 547 U.S. at 421.

However, Petitioners have failed to point to any record evidence that describes Respondents' official job duties. Petitioners cannot claim entitlement to summary judgment by virtue of satisfying the "pursuant to . . . official job duties" test without adducing any evidence whatsoever as to what those job duties are. *See, e.g., Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1106 (9th Cir. 2011) (reversing summary judgment on qualified immunity grounds where "there is no evidence that testifying in court, whether or not as an expert, was a part of [the employee's] official duties. . . . When viewed in the light most favorable to [the employee], the record evidence supports a finding that [the employee] was not testifying as part of his official duties.") (internal citation omitted); *Mercado-Berrios v. Cancel-Alegria*, 611 F.3d 18, 26 (1st Cir. 2010) ("The relevant inquiry under

Garcetti thus has two basic components – (1) what are the employee's official responsibilities? and (2) was the speech at issue made pursuant to those responsibilities? – both of which are highly context-sensitive.").

Perhaps recognizing the lack of evidence regarding Respondents' job duties, Petitioners now attempt to cobble together evidence that reporting known wrongdoing was a part of both Respondents' jobs. Specifically, they contend that (1) Camp admitted he spoke out pursuant to his job duties; (2) the district court "found" that Camp had spoken pursuant to his job duties; and (3) the Alabama Code imposes an obligation on Camp to speak. These contentions are demonstrably false.

1. There Are No Admissions that Speech Was Pursuant to Official Job Duties.

In *Garcetti*, both parties agreed that the speech was pursuant to the plaintiff's employment duties. *Garcetti*, 547 U.S. at 424. Other courts have likewise relied on admissions that the employee spoke pursuant to job duties in holding the speech was not protected. *E.g.*, *Barclay v. Michalsky*, 368 Fed. App'x 266 (2d Cir. 2010). Hoping to take advantage of such cases, Petitioners claim that Camp made such an admission. *See* Pet. 21 ("***As the Respondents have in this case***, the employee in *Barclay* testified that the duty to file complaints was '*my* job' and '*my*

duty.'") (emphasis added).[11] Camp never uttered the words "my job" or "my duty." App. 146a-147a. Instead, Camp testified that he felt an ethical obligation, as a medical professional, to report Dr. West. App. 146a-147a.[12] Similarly, Martindale testified only that she personally felt that Dr. West's misconduct "needed to be reported." App. 151a. Neither Camp nor Martindale tied their personally-felt ethical obligations to their job duties. Such testimony is a far cry from *Garcetti* (or even *Barclay*) where it was entirely undisputed that the speech was made pursuant to official job duties.

2. Respondents' Speech Was Not Pursuant to a General Policy Requiring Reporting to the Dental Board.

Petitioners attempt to patch the factual hole in their argument with a reference to a supposed "finding" by the district court that Camp spoke pursuant to a general job policy at PHS "requiring dentists to

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[11] The employee in *Barclay* "concede[d] that she personally received instructions from '[defendant] Hughes, among others, . . . to report the violations verbally to her supervisors.'" *Barclay v. Michalsky*, 368 Fed. App'x 266 (2d Cir. 2010). There is no evidence that Respondents were personally instructed to make their reports to the Dental Board or the ADOC.

[12] Camp was not asked to identify the source of the obligation he felt, but no fair reading of his testimony could suggest that he believed the source was his job at PHS. App. 147a (testifying that "the Act doesn't discriminate about" wrongdoing by dentists, but "every dentist has a different opinion about it").

report misconduct to PHS and the Dental Board." Pet. 18. This mischaracterization of the record was made possible by quoting the district court out of context. What the district court actually said was:

> Moreover, the court is not convinced that Camp's communications made pursuant to a general policy requiring that dentists report misconduct to PHS and the Dental Board – i.e., "inside the chain of command" – are sufficient to bring Camp's letter and complaint within the ambit of unprotected speech.

App. 42a.

Importantly, this language immediately followed the district court's citation to *Garcetti* for the proposition that written job descriptions and employment policies are "neither necessary nor sufficient" to determine official job duties. App. 41a. Seen in the proper context, the district court was assuming such a policy existed for the sake of argument, and was not making a factual finding. Just as importantly, the district court correctly applied *Garcetti* to Petitioners' argument and held that a general chain-of-command policy was not sufficient to render all employee speech "pursuant to . . . official job duties." App. 42a; *see also Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1205 (10th Cir. 2007) (holding that "we cannot deem such a generalized grievance policy to be an official duty without eviscerating *Garcetti*"); *Garcetti*, 547 U.S. at 424 ("We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job

descriptions. . . . The proper inquiry is a practical one.").

There is no evidentiary basis for any court to have made the factual finding Petitioners claim was made. And if such a finding had been made, Petitioners' argument was still rejected.[13] Petitioners have failed to present any evidence regarding Respondents' actual job duties.

3. The Alabama Code Does Not Provide Evidence of Respondents' "Official Job Duties."

Finally, Petitioners rely on an Alabama statute governing dentists and dental hygienists in their attempt to prove Respondents' job duties included the speech for which they suffered retaliation. Pet. 18. Petitioners reason that (a) dentists are governed by Alabama Code section 34-9-2; (b) Camp was employed by PHS as a dentist; ergo, (c) Camp's "official job duties" included all the duties set forth in the statute, allegedly including an obligation to report observed misconduct to the Dental Board. Pet. 18. This argument is flawed.

First, Alabama Code section 34-9-2, does not actually require that dentists (or dental assistants

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[13] Even if PHS required Camp to report Dr. West to the Dental Board, he also wrote to the ADOC Commissioner. App. 38a (noting that there is "no evidence of Camp's professional obligation to report such conduct to the ADOC Commissioner.").

like Martindale) report brutal or unsanitary dental practices to the Dental Board. Indeed, to the extent that that entire chapter of the Alabama Code addresses the "official job duties" of dentists, it focuses on the practice of dentistry.[14] Even the section dealing with discipline does not mention any obligation to report "brutal," "painful," or unsanitary dentistry. *See* Ala. Code § 34-9-18.

Moreover, a general obligation imposed by statute is not dispositive as to whether reporting is done pursuant to official job duties. *See, e.g.*, *Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008) ("Such a broadly applicable legal duty says little about Trigillo's duties as the manager of procurement. To define Trigillo's official duties, we must do more than look to general statutes."); *Reinhardt v. Albuquerque Public Sch. Bd. of Ed.*, 595 F.3d 1126, 1137 (10th Cir. 2010) ("[I]t cannot be the case that a criminal liability statute aimed at every public official should somehow become part of every public official's job description."). No state should be permitted to pass a statute of general obligation and thereby grant itself license to retaliate against all its employees, regardless of job.

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[14] *See* Ala. Code § 34-9-6 (listing duties that constitute the practice of dentistry, including "repair[ing] or fill[ing] cavities in the human teeth" or supplying "artificial substitutes for the natural teeth"); § 34-9-27 (listing duties that "may" be performed by dental hygienists, such as "remov[ing] calcareous deposits, accretions or stains from the teeth" or "tak[ing], develop[ing] and mount[ing] oral X-rays").

Even if a statutory obligation to report misconduct existed, it would be limited to reports to the Dental Board. The Alabama Code did not require Camp to report to the ADOC Commissioner. *See Reinhardt*, 595 F.3d at 1137 (holding that even if a statute generally applicable to school employees created a job duty for speech-language pathologist, complaint outside of statutory framework "was beyond [the employee's] professional responsibilities"). If the Alabama Code is the source of Camp's job duties, his report to the ADOC Commissioner could not be pursuant to his job duties. *See* App. 40a.

Petitioners have failed to identify any evidence of Respondents' actual job duties. Without such evidence, it cannot be determined at the summary judgment stage that Respondents spoke "pursuant to their official job duties." As a result, there was no error in denying summary judgment based on qualified immunity.

C. The Eleventh Circuit Correctly Applied the Non-Dispositive Factors Identified by *Garcetti* and Others.

Given the lack of evidence regarding Respondents' job duties at the time they complained to the ADOC and the Dental Board, the Eleventh Circuit considered various factors to help make its practical inquiry into whether Respondents had acted "pursuant to their official job duties." App. 8a n.2. In addressing each factor and noting that it favored

Respondents, the Eleventh Circuit did not conflict with other cases holding that such factors were non-dispositive, or cases where different facts led to a different conclusion. There is no circuit split warranting this Court's review.

1. That Facts Were Learned at Work Does Not Mean Speech Owes Its Existence to Official Job Duties.

Petitioners contend that since Respondents learned about West's misconduct at work, the speech "owes its existence" to the job and is necessarily "pursuant to their official job duties." Pet. 27. However, the place where a public employee discovers facts that he later speaks about is not determinative of whether the speech is "pursuant to [his] official job duties" or not. *E.g., Charles v. Grief*, 522 F.3d 508, 513 (5th Cir. 2008) ("To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights."). Indeed, Mr. Pickering learned about the facts he included in his letter to the editor at work, but that speech was protected by the First Amendment. *Pickering*, 391 U.S. 563, app'x (1968), ("I teach at the high school and I know this just isn't the case.").

Moreover, to the extent Petitioners argue that the "owes its existence to" language from *Garcetti* creates a but-for causation rule, they misread *Garcetti*. The Court explained that "owes its existence

to" means that the employer has "commissioned or created" the speech. *Garcetti*, 547 U.S. at 421-22. There is no evidence that PHS "commissioned or created" the complaint to either the Dental Board or the ADOC. As a result, the Eleventh Circuit correctly noted that Respondents' speech did not "owe[ ] its existence to" their jobs.

2. That Speech Was Related to the Job in Some Way Does Not Mean It Was "Pursuant to . . . Official Job Duties."

Petitioners further argue that because part of Camp's letter to the ADOC related to equipment shortages, his speech was "pursuant to [his] official job duties." Pet. 20-21. However, job-related speech is not necessarily unprotected.[15] Moreover, Respondents also alerted the ADOC and the Dental Board to Dr. West's brutal, painful, and unsanitary dentistry. Petitioners fail to explain how Respondents' report about Dr. West's brutal and unsanitary dentistry would help either Respondent perform their own jobs.

Thus, Petitioners' focus on equipment shortages is a selective citation to Camp's letter, and ignores

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[15] *See Garcetti*, 547 U.S. at 421 ("The First Amendment protects some expressions related to the speaker's job."); *Reinhardt*, 595 F.3d at 1136 (noting that "it would be going too far to hold that every time a public employee discovers alleged wrongdoing related to his job and brings it to the attention of law enforcement or other outside parties, the speech is unprotected").

Respondents' Dental Board complaints, which did not even mention equipment shortages. App. 168a-173a. But even the selective citation is of no avail to Petitioners. That some of the speech in the letter may have been job-related does not render the entire act of speaking unprotected. *See Garcetti*, 547 U.S. at 421 (noting that the "First Amendment protects some expressions related to the speaker's job."); *Davis v. McKinney*, 518 F.3d 304, 314 (5th Cir. 2008) (holding that proper approach is "analyzing mixed speech in a single communication by dividing the communication by topic and applying First Amendment analysis to each topic separately."). Thus, while some of Respondents' speech may have been job-related, Petitioners have failed to show that any of it was pursuant to their official job duties.

3. That Speech Was Outside Day-to-Day Job Duties Is Relevant, Though Not Dispositive.

Petitioners claim that the Eleventh Circuit erred in noting that reporting misconduct by other dentists was not part of Camp's "daily professional activity." Pet. 18-20. That fact is true, and relevant to the ultimate question of whether Camp spoke "pursuant to his official job duties." App. 8a n.2. The Eleventh Circuit[16] did not treat this factor as dispositive, and

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[16] It was in fact the district court that used this language, not the Eleventh Circuit. App. 42a.

therefore there is no conflict with the Second Circuit's holding that ad hoc job duties can still satisfy *Garcetti*. *Weintraub v. Bd. of Ed.*, 593 F.3d 196, 203 (2d Cir. 2010) (holding that teacher's union grievance was "pursuant to [his] official job duties" under *Garcetti*, though not a day-to-day job duty of a teacher). There is no error in merely noting that the speech was outside Respondents' "daily professional activity."

4. Supervisory authority is relevant, but not dispositive.

Similarly, Petitioners claim that the Eleventh Circuit erred in noting that Camp had no supervisory authority. Pet. 22-23. But the Eleventh Circuit did not treat this fact as dispositive. *See* App. 8a n.2. As a result, there is no conflict with the Seventh Circuit's holding that lack of supervisory responsibility is not dispositive under *Garcetti*. Pet. 22-23; *Vose v. Kliment*, 506 F.3d 565 (7th Cir. 2007) ("While Vose may have gone beyond his ordinary *daily* job duties in reporting the suspected misconduct outside his unit, it was not beyond his official duty as a sergeant of the narcotics unit to ensure the security and propriety of the narcotics unit's operations."). Indisputably, though, the fact that Camp had no supervisory responsibility over West is relevant to the question of whether Camp's report of West's wrongdoing was "pursuant to [Camp's] official job duties." In noting a relevant fact, the Eleventh Circuit cannot have erred.

Having considered various factors that might help determine whether Respondents' speech was "pursuant to their official job duties," there is no evidence that Respondents spoke "pursuant to their official job duties," and the Eleventh Circuit did not err in affirming the denial of summary judgment.

D. Petitioners Do Not Challenge Any Part of Petitioners' First Amendment Retaliation Claim Other than Whether Their Speech Was Pursuant to Official Job Duties.

Petitioners argue only that Respondents spoke "pursuant to their official job duties." They put forth no opposition to the district court's ruling that the speech was on a matter of public concern, that the *Pickering* balancing test weighs in favor of Respondents, or that there are fact questions regarding whether Petitioners' constitutionally-protected speech was a motivating factor in Respondents' decision to take adverse action. Pet. 43a-48a. Accordingly, the district court and Eleventh Circuit decisions were both proper, and Petitioners have failed to present any compelling reason for this Court to issue a writ of certiorari.

II. Petitioners Had Reasonable Notice that Retaliation in This Context Would Be Unlawful.

A. Factually Analogous Case Law Is Not Required to Overcome Qualified Immunity.

Petitioners claim that they were entitled to qualified immunity because the law was not "clearly established" at the time they retaliated against Respondents for their speech. Pet. 24-25. They suggest that the lack of a case holding that prison dentists do not speak pursuant to job duties when they complain outside the chain of command entitles them to qualified immunity.

However, a prior case with materially similar facts is not necessary to demonstrate that the law is "clearly established."[17] Rather, the law at the time of the act need only be sufficiently established to give "fair warning" to the official that his conduct is unlawful. *Hope v. Pelzer*, 536 U.S. 730, 740 (2002) ("[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their

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[17] *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.") (alteration in original, internal quotations omitted).

conduct is unlawful.'") (quoting *Saucier v. Katz*, 533 U.S. at 206). Regardless of prior case law, Petitioners should have known that retaliation for speaking out against dangerous, brutal, and unsanitary dentistry being practiced on inmates was unconstitutional.[18]

Petitioners also argue that there is a circuit split over whether the law after *Garcetti* is clearly established. Pet. 29-30. They note that the Second, Seventh, and Eighth Circuits have all granted qualified immunity after *Garcetti*, while the Third, Fifth, Ninth, Tenth (and now Eleventh) Circuits have all denied qualified immunity. Pet. 29-30. Petitioners fail to disclose that the Seventh and Eighth Circuit cases

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[18] In any event, several cases should have put Petitioners on notice that they were prohibited from retaliating against Respondents for exercising their First Amendment rights to report hazardous conditions and expose mistreatment of wards of the State. *See, e.g., Pickering*, 391 U.S. at 574 (employee's criticism of Board of Education is protected by the First Amendment); *Walker v. Schwalbe*, 112 F.3d 1127, 1133 (11th Cir. 1997) ("clearly established law informed reasonable government officials that [Plaintiff] could not be punished for his First Amendment speech," which involved improving the services a state agency provides to the public); *see also Eng v. Cooley*, 552 F.3d 1062, 1076 (9th Cir. 2009) ("Because this case involved mere application of settled law to a new factual permutation, . . . we conclude that Eng's personal First Amendment interest in [his lawyer's] speech was clearly established by 2003."); *Lee v. Nicholl*, 197 F.3d 1291, 1296 (10th Cir. 1999) (public employee's speech alleging a danger to public health or safety is protected by the First Amendment); *Tao v. Freeh*, 27 F.3d 635, 640 (D.C. Cir. 1994) (FBI translator spoke as citizen when reporting race discrimination because her job duties did not include reporting discrimination).

they cite both expressly held that *Garcetti* ***did not apply***.[19] These cases, therefore, cannot contribute to a circuit conflict regarding the availability of qualified immunity after *Garcetti*. The only remaining question is whether the Second Circuit case is in conflict. In that case, the Second Circuit held that qualified immunity applied because "[t]he courts have yet to consider whether speech that would not enjoy First Amendment protection if made pursuant to an official duty can claim such protection when made in violation of that duty." *Drolett v. Demarco*, 382 Fed. App'x 7 (2d Cir. 2010). None of the other cases cited by Petitioners wherein qualified immunity was at issue (including the case at bar), addresses qualified immunity in the context of an employee speaking in "violation of" a job duty. Accordingly, none of those cases, when contrasted with the *Drolett* case, creates a circuit split calling for this Court's review.

The circuits generally agree (and public employers are on notice) that retaliating against employees for engaging in speech outside their "official job duties" is unconstitutional. *See Adams v. Trustees of the Univ. of N.C. – Wilmington*, 2011 U.S. App. LEXIS 7036, *40 (4th Cir. Apr. 6, 2011) ("[T]he underlying right Adams asserts the Defendants violated – that of a public employee to speak as a citizen on

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[19] *Chaklos v. Stevens*, 560 F.3d 705, 711 (7th Cir. 2009) ("*Garcetti* does not apply."); *Dempsey v. City of Omaha*, 633 F.3d 638, 648 (8th Cir. 2011) ("We hold that *Garcetti* simply does not apply to Dempsey's speech.").

matters of public concern – is clearly established and something a reasonable person in the Defendants' position should have known was protected. As such, the Defendants are not entitled to qualified immunity[.]"); *Davis*, 518 F.3d at 317 ("At the time of the alleged violation of Davis' free speech rights, both Supreme Court and Fifth Circuit law clearly proscribed retaliation by a government employer against an employee for engaging in protected speech."). As a result, the lower courts here properly rejected Petitioners' qualified immunity defense.

B. Where the *Pickering* Balancing Test Weighs Heavily in Favor of Protecting Speech, Reasonable State Officials Are on Notice that Retaliation Is Prohibited.

In addressing the qualified immunity issue, the Eleventh Circuit said, "[i]f a case with analogous facts is needed, the *Akins* case is close enough." App. 6a; *see Akins v. Fulton Cnty., Ga.*, 420 F.3d 1293, 1308 (11th Cir. 2005) ("*Akins I*"). In that case, several Fulton County purchasing employees complained to a county commissioner about bidding irregularities. *Id.* The Eleventh Circuit found that "the result of the *Pickering* balancing was clear and predictable enough to defeat a motion for summary judgment based on qualified immunity." App. at 6a-7a.

Here, the Eleventh Circuit correctly found that the *Pickering* balancing test is similarly clear, predictable, and weighs entirely in Respondents' favor.

App. 7a-8a. The public interest in learning of brutal and unsanitary dentistry practiced by government contractors is extremely high.[20] Moreover, the public has an interest in learning about a dentist whose violation of professional norms could result in the transmission of HIV and hepatitis C within (and beyond) the Alabama state prison population. App. 38a-39a. On the other side of the scale, the state has no interest in retaliating against Respondents for bringing information about West to light. There is no evidence that Respondents' speech caused any kind of disruption. App. 9a ("The manner, time, and place of the plaintiffs' complaints to the Dental Board were appropriate and not unduly disruptive of the State's provision of public services."). And, given that the Dental Board sanctioned West based on Respondents' information, the speech was true and cause for serious concern. App. 174a *et seq*.

Therefore, as the Eleventh Circuit concluded under *Akins I*, the *Pickering* balancing test weighs so heavily in favor of Respondents that Petitioners were on notice that retaliation was prohibited. That notice is sufficient to satisfy the "clearly established" burden and overcome qualified immunity.[21] *See also Cook v.*

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[20] *See, e.g.*, Ala. Code § 34-9-2 ("It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry in the State of Alabama.").

[21] Petitioners suggest that the Eleventh Circuit relied on bad law because *Akins I* was overruled. Pet. 31-32 (*citing Akins*

(Continued on following page)

Gwinnett Cnty. Sch. Dist., 414 F.3d 1313, 1320 (11th Cir. 2005) ("We therefore conclude that the *Pickering* balance tilted conclusively in favor of Cook such that defendants had fair and clear warning that their actions were unconstitutional."); *Reilly v. City of Atlantic City*, 532 F.3d 216, 233 (3d Cir. 2008) ("[Defendant] provides no compelling support for his argument that the law was not clearly established in this area. The *Pickering* balancing test was clearly established at the time of the alleged retaliation, as was the notion of pretextual discipline in the context of a First Amendment retaliation claim."). Accordingly, there is neither an error nor a split of authority on the issue of qualified immunity that would justify this Court's review of the case.

III. There Is No Conflict Between The Eleventh Circuit's Decision and the First Circuit's *Philip v. Cronin* Case.

Petitioners finally argue that the Eleventh Circuit's decision conflicts with the First Circuit's decision in *Philip v. Cronin*, 537 F.3d 26 (1st Cir. 2008). In *Philip*, the First Circuit found that the defendant was entitled to qualified immunity because

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v. Fulton Cnty., Ga., 278 Fed. App'x 964, 970 (11th Cir. 2008) ("*Akins II*")). However, the Eleventh Circuit reached a different outcome in *Akins II* only because application of *Garcetti*'s threshold inquiry rendered the decisional basis of *Akins I* inapplicable on those facts. At most, *Akins II* held that *Akins I* was inapplicable in that factual context – not that it was legally wrong.

he reasonably could have believed that his and his superiors' collective decision to terminate the physician-plaintiff did not violate that physician's clearly established First Amendment rights. *Id.*

But the fact that a defendant was granted qualified immunity in one case, and denied it in another, does not necessarily indicate a conflict between the courts deciding those cases.[22] Nevertheless, Petitioners (1) ignore one of the First Circuit's alternative holdings and (2) misstate the facts in their attempt to manufacture a conflict with *Philip*.

A. The First Circuit's Alternative Holdings in *Philip*.

In *Philip*, the First Circuit addressed a physician's claim of First Amendment retaliation against the Chief Administrator (the "administrator") of his employer, the Office of the Chief Medical Examiner of Massachusetts (the "OCME"). The physician was terminated shortly after sending the governor a critical letter and separate memorandum expressing concerns regarding organ procurement. *Philip*, 537 F.3d at 30-31. The administrator and at least three of his superiors made the decision in a meeting. *Id.* at

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[22] *See Safford Unified Sch. Dist. # 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) ("We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.").

31. The meeting participants all favored termination after discussing the memorandum to the governor as well as prior unprofessional behavior by the physician. *Id.*

On appeal of a directed verdict for the administrator, the First Circuit found that the physician had engaged in protected speech and that the temporal proximity between his speech and his termination was sufficient to survive the directed verdict motion. *Philip*, 537 F.3d at 33. Nonetheless, the First Circuit affirmed on qualified immunity grounds. *Id.* at 34-35. The First Circuit held that a reasonable official in the administrator's position could have believed that no First Amendment violation took place, although the Court assumed such a violation in the case before it. *Id.* at 34-35.

First, the court noted that the termination decision was made collectively, and each of the decision-makers had reasons unrelated to protected speech for terminating the physician. *Id.* at 34. Thus, the court reasoned, the administrator could have reasonably believed that the termination decision was not motivated by protected speech. *Id.* Second, the court found that the administrator could have reasonably believed that discharging the physician could "curtail the potential for future harm to the office," and that even if the administrator was mistaken in his belief, such mistake was not egregious. *Id.* at 34-35.

B. Petitioners Misconstrue the First Circuit's Holding in *Philip* With Respect to the Collective Nature of the Termination Decision.

In their zeal to manufacture a conflict with *Philip*, Petitioners ignore the First Circuit's alternative holding. Collective decision-making notwithstanding, the First Circuit held that the administrator was entitled to qualified immunity because he could have reasonably believed that discharging the physician would have prevented further harm to the office. *Philip*, 537 F.3d at 34-35. This independent ground for granting qualified immunity – which does not exist here – substantially devalues any perceived conflict between *Philip* and the case below.

Moreover, Petitioners attach undue weight to the First Circuit's dicta that the termination decision was made collectively. There is no indication in *Philip* that the collective nature of the termination decision was a determinative factor in the court's finding of qualified immunity. Rather, the court focused on the fact that each of the decision makers, including the administrator, had reasons unrelated to protected speech for discharging the physician. *See Philip*, 537 F.3d at 34. Because the collective nature of the decision was not determinative to the First Circuit's finding of qualified immunity, it cannot support a conflict with the Eleventh Circuit's decision here, even assuming that the decision here was a "collective" one.

C. The Factual Record Does Not Support Petitioners' Assertion that They Participated in a Collective Decision Similar to *Philip v. Cronin*.

Petitioners rely heavily on the First Circuit's brief discussion of the collective nature of the termination decision in *Philip*. Pet. 35-39. In doing so, Petitioners stretch the facts to fit the description of a "collective" decision. Pet. 38-39. But there is no evidence that CMS's decision to not hire Respondents was made collectively. Rather, Petitioners told Linton to not hire Respondents, and Linton followed their direction.

Specifically, before giving approval for CMS to hire Camp as a contract dentist, Linton emailed Respondents to get their opinion on Camp. App. 16a. Ferrell responded "Absolutely Not!" and referenced Camp's prior complaint to the Dental Board. App. 17a. Upon receiving this email, Linton instructed his recruiter to stop pursuing Camp. *Id.* A few days later, Naglich emailed Linton advising that it was "[n]ot in our best interest" to hire Camp. *Id.* Naglich and Linton then had a conversation in which Naglich conveyed to Linton that the ADOC did not want Camp or Martindale working at ADOC prisons. App. 18a, 20a. Linton testified that, after this conversation, the decision not to contract with Camp was final. App. 18a. Likewise, Linton relayed the message not to hire Martindale. App. 20a.

The facts at bar are distinguishable from those in *Philip*. The record does not show that Linton exercised any discretion, made any recommendation, or participated at all in the decision not to hire Respondents. Unlike in *Philip*, the record before this Court does not reflect a round-table meeting in which participants reached a consensus to take an adverse employment action. Rather, CMS was set to hire both Respondents until Petitioners intervened. After hearing from Petitioners, Linton did exactly what Petitioners told him to do – not hire either Respondent. Indeed, the district court noted Linton's testimony that "if the client doesn't want to hire someone . . . then we won't hire someone. . . ." App. 18a. This process is the antithesis of collective decision-making.

Without a collective decision in this case, Petitioners' argument that the Eleventh Circuit's opinion conflicted with the First Circuit's implodes. There is no conflict among the circuits on any issue raised by the Petition, and the Eleventh Circuit did not err in affirming the denial of summary judgment on qualified immunity grounds. Thus, there is no compelling reason for this Court to issue a writ of certiorari.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the petition for writ of certiorari should be denied. Respondents request attorney's fees and costs on appeal in connection with their claim under 42 U.S.C.

§ 1983. Respondents also request attorney's fees and costs, including double costs, for Petitioner's filing of a frivolous petition under Supreme Court Rules 42(2) and 43(7).

Respectfully submitted,

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